

IN THE ARBITRATION UNDER THE TREATY BETWEEN  
THE UNITED STATES OF AMERICA AND THE REPUBLIC OF ECUADOR  
CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS  
AND THE UNCITRAL ARBITRATION RULES (1976)  
BETWEEN

THE REPUBLIC OF ECUADOR,

*Claimant/Party,*

*-and-*

THE UNITED STATES OF AMERICA,

*Respondent/Party.*

PCA CASE NO. 2012-5

**MEMORIAL OF RESPONDENT UNITED STATES OF AMERICA  
ON OBJECTIONS TO JURISDICTION**

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## TABLE OF CONTENTS

PRELIMINARY STATEMENT .....	1
I. STATEMENT OF FACTS .....	7
A. <i>CHEVRON V. ECUADOR</i> .....	7
B. ECUADOR DEMANDS A JOINT INTERPRETATION OF ARTICLE II(7) OF THE TREATY.....	10
C. ECUADOR SIMULTANEOUSLY THREATENS TO TERMINATE THE TREATY .....	12
II. ARGUMENT .....	15
A. ECUADOR’S CLAIMS FALL OUTSIDE THE SCOPE OF ARTICLE VII BECAUSE THERE IS NO “DISPUTE BETWEEN THE PARTIES CONCERNING THE INTERPRETATION OR APPLICATION OF THE TREATY” .....	15
1. Under the Ordinary Meaning of Article VII, Read in Context and in Light of the Treaty’s Object and Purpose, There Is No “Dispute” Between the Parties Under Article VII .....	16
i. The Ordinary Meaning of “Dispute” Does Not Encompass Ecuador’s Claims .....	16
ii. The Treaty’s Context Confirms the Absence of a “Dispute” .....	18
iii. The Treaty’s Object and Purpose Further Confirms the Absence of a “Dispute” .....	20
2. A “Dispute” Requires a “Concrete Case” Alleging a Treaty Violation.....	21
3. Because the United States Has Not Positively Opposed any Allegation of Treaty Violation, There Is No “Dispute” Between the Parties.....	29
i. “Positive Opposition” Requires that Parties Take Contradictory Positions on Obligations at Issue in a Concrete Case .....	30
ii. Ecuador Cannot Create Positive Opposition Where None Exists.....	34
B. THE UNITED STATES DOES NOT OWE ECUADOR AN OBLIGATION TO RESPOND TO, LET ALONE CONFIRM, ECUADOR’S UNILATERAL INTERPRETATION OF THE TREATY.....	36
1. Ecuador Cannot Unilaterally Require the United States to Respond to its Demand for Confirmation of its Interpretation .....	37
2. Nothing in the Treaty Obligates the United States to Respond to Ecuador’s Demand for Confirmation of its Interpretation.....	38
i. “Good Faith” Cannot Expand a Party’s Obligations Under a Treaty .....	39
ii. General International Law Does Not Require a State to Respond to an Interpretative Declaration .....	41
iii. Treaty Practice Under BITs Does Not Support Ecuador’s Unprecedented Actions in this Case .....	43

C.	ARTICLE VII DOES NOT CREATE ADVISORY, APPELLATE, OR REFERRAL JURISDICTION .....	47
1.	Article VII Does Not Create Advisory Jurisdiction.....	49
2.	Article VII Does Not Create Appellate Jurisdiction .....	50
3.	Article VII Does Not Create Referral Jurisdiction .....	53
D.	A FINDING OF JURISDICTION WOULD EXCEED THE TRIBUNAL’S JUDICIAL FUNCTION, AND ANY AWARD WOULD CONSTITUTE JUDICIAL LAWMAKING.....	55
E.	EXERCISING JURISDICTION WOULD BE CONTRARY TO THE TREATY’S OBJECT AND PURPOSE AND WOULD HAVE FAR-REACHING AND DESTABILIZING CONSEQUENCES FOR INTERNATIONAL ADJUDICATION .....	59
1.	Interpreting Article VII to Encompass Decisions on Legal Questions Decided by Investment Tribunals Under Article VI Would Conflict with the Object and Purpose of the BIT to Establish a Stable, Predictable, and Neutral Investor-State Dispute-Settlement Process .....	59
2.	Finding Jurisdiction Would Chill Bilateral Dialogue Between the Parties and Effectively Nullify the Treaty’s Consultations Provision.....	62
3.	Finding Jurisdiction Would Establish a Dangerous Precedent for the Interpretation of Other Treaties .....	66
III.	RELIEF SOUGHT .....	67

**MEMORIAL OF RESPONDENT UNITED STATES OF AMERICA  
ON OBJECTIONS TO JURISDICTION**

Pursuant to Article 21 of the UNCITRAL Arbitration Rules (1976), and in accordance with the Tribunal's Procedural Order No. 1 dated April 9, 2012, the United States of America respectfully submits this Memorial on Objections to Jurisdiction.

**PRELIMINARY STATEMENT**

This is an extraordinary case of first impression for dispute settlement under international investment agreements. Ecuador seeks to create a "dispute" under Article VII of the U.S.-Ecuador Bilateral Investment Treaty ("BIT" or "Treaty") where none exists, and to obtain an "authoritative interpretation" to bind the Parties in the absence of their mutual consent.

In a June 8, 2010 letter, Ecuador informed the United States that an investment tribunal had "erroneously" interpreted Article II(7) of the Treaty. Ecuador then provided the United States with the "proper" interpretation of that provision, and demanded "confirmation" of its views from the United States. Ecuador contends that the United States owed Ecuador a response to its demand and that the United States' non-response entitles Ecuador to seek from this Tribunal an "authoritative interpretation" of that "disputed" provision. Ecuador's claim has no foundation in international law and, if accepted, would destabilize the operation of BITs, particularly regarding dispute settlement.

Ecuador's theory of jurisdiction in this case rests on three faulty premises. *First*, Ecuador wrongly implies that its request for an interpretation demanded a positive response from the United States and that by not responding the United States somehow failed to comply with its obligations under the Treaty. In fact, Ecuador has conceded in this arbitration that the United

States has done nothing whatsoever to affect Ecuador's rights or obligations under the Treaty.

Ecuador expressly acknowledges that it

has not accused the United States of any wrongdoing. It does not accuse the United States of violating any of its international obligations. It does not seek compensation from the United States. It does not seek an order against the United States.<sup>1</sup>

If there is no allegation that the United States engaged in any wrongful conduct that impaired Ecuador's rights under the BIT, there can be no concrete dispute regarding the interpretation of the Treaty for this Tribunal to settle. And if there is no dispute under Article VII, then the Tribunal lacks jurisdiction and the case should be dismissed.

*Second*, Ecuador erroneously implies that the United States' non-response necessarily establishes that the Parties have divergent views on the meaning of Article II(7), thereby putting the Parties in "positive opposition" over the meaning of that provision. But Ecuador admits: "The U.S. never informed Ecuador that it agreed with Ecuador's interpretation of Article II(7), or, for that matter, that it disagreed with Ecuador's interpretation."<sup>2</sup> Ecuador thus concedes that the United States never addressed Ecuador's proposed interpretation of Article II(7), and that the United States "never offered an opinion or commented on Ecuador's interpretation, nor . . . ever provide[d] Ecuador with its own interpretation of Article II(7)."<sup>3</sup> If the United States has not expressed an interpretation of Article II(7), it cannot be in positive opposition with Ecuador with respect to that provision, and there cannot be a "dispute" within the meaning of Article VII.

*Third*, Ecuador improperly asserts that the United States was legally required to respond to its "request for interpretation." But nothing in the Treaty or in general international law

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<sup>1</sup> Transcript of Preparatory Meeting, Mar. 21, 2012, at p. 18 (statement of Ecuador's counsel).

<sup>2</sup> *Id.* at p. 10.

<sup>3</sup> *Id.*

creates an obligation on the United States to have responded to Ecuador's request. Ecuador never sought consultations with the United States under the BIT or actually requested negotiations toward a mutual interpretation. Instead, Ecuador demanded that the United States "confirm" Ecuador's unilateral interpretation of that provision, and warned that "[i]f such a confirming note is not forthcoming or . . . [if] the United States does not agree with . . . Ecuador, an *unresolved dispute* must be considered to exist between" the Parties.<sup>4</sup> By its own terms, then, Ecuador's request was not a good-faith invitation to consultations, but a mere tactic to set up this arbitration. But even if Ecuador had made a good-faith request for a joint interpretation of Article II(7), the United States was under no obligation to "confirm" Ecuador's unilateral interpretation of that provision.

The ordinary meaning of the text of Article VII, read in context and in light of the object and purpose of the BIT, demonstrates that there is no "dispute" between the Parties. Rather, what Ecuador has submitted is a demand that the Tribunal revisit the interpretation of Article II(7) provided by an investor-State tribunal in exercising its jurisdiction under Article VI of the Treaty. The "points at issue" in Ecuador's Request for Arbitration raise purely abstract questions and do not demonstrate the existence of a concrete dispute between the Parties.

Article VII covers only "disputes," a term well understood in international law to mean (1) a "concrete case" alleging failure to perform under the Treaty, and (2) the existence of "positive opposition" between the parties as to the alleged non-performance. Under Article VII, a "dispute" must be capable of "binding resolution in accordance with the applicable rules of international law." Article VII thus excludes political disagreements between the Parties, such as

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<sup>4</sup> Letter from Ecuadorian Minister of Foreign Affairs, Trade and Integration Ricardo Patiño Aroca to U.S. Secretary of State Hillary Clinton (June 8, 2010) ("Patiño Letter"), at pp. 3-4 (emphasis added) [R-2].

the one Ecuador raises in this arbitration. A political disagreement is at most a “matter” within the meaning of Article V of the Treaty, which expressly allows discussion, although not arbitration, of “any *matter* relating to the interpretation or application of the Treaty.”<sup>5</sup>

Ecuador does not hide that it seeks an “authoritative interpretation” to address issues that do not arise out of a concrete claim of breach of the Treaty by the United States. Indeed, Ecuador has asked this Tribunal: “What precisely are Ecuador’s obligations under Article II(7), obligations which it did not understand it was assuming when it signed the BIT with the United States?”<sup>6</sup> Although the Parties might have addressed this question in consultations under Article V, this Tribunal lacks jurisdiction to answer it, as the question arises outside the context of a “dispute” between the Parties within the meaning of Article VII.

This Tribunal does not have advisory jurisdiction and cannot issue “authoritative” decisions binding on other tribunals. Nor can the Tribunal “precisely” guide the Parties, as Ecuador asks, on the implementation of their international legal obligations, so that they can know how many judges should be hired, how to monitor litigation involving foreigners in their courts, or the speed at which domestic trials must be concluded.<sup>7</sup> The Tribunal, moreover, has no appellate jurisdiction, and thus cannot sit in judgment of an investment tribunal’s prior decision or correct that tribunal’s allegedly erroneous interpretation of Article II(7). Finally, this Tribunal does not have referral jurisdiction, and thus cannot resolve legal questions posed by States, by investors, or by other tribunals for use in investor-State arbitration or elsewhere.

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<sup>5</sup> Emphasis added.

<sup>6</sup> Transcript of Preparatory Meeting, Mar. 21, 2012, at p. 15 (statement of Ecuador’s counsel).

<sup>7</sup> *See id.* at pp. 15-16 (statement of Ecuador’s counsel).

The Tribunal's acceptance of jurisdiction in this case would be inconsistent with the text of Article VII and nearly a century of unbroken international jurisprudence confirming the meaning of "dispute." To permit Ecuador to proclaim the "proper" meaning of a treaty provision, demand "confirmation" of its unilateral view, and then seek an "authoritative interpretation" from this Tribunal of the "disputed" provision would have at least four far-reaching and potentially destabilizing consequences for international adjudication and investment treaties.

*First*, it would constitute inappropriate judicial lawmaking. International arbitral tribunals must restrict their contentious jurisdiction to resolving concrete disputes between the parties concerning violations of their treaty obligations, not to fashioning general rules to address issues of an abstract nature.

*Second*, taking jurisdiction to pronounce the meaning of Article II(7) would contradict a principal object and purpose of the Treaty, which is to encourage investment by giving assurances that, if disputes arise, investors can obtain final and binding awards in a depoliticized forum. As Professor Reisman discusses in the accompanying expert report, granting Ecuador's request in this case would undermine the system of investment arbitration. It would add tremendous uncertainty to the final and binding nature of investor-State awards. Under Ecuador's theory, States could unilaterally seek a preferred interpretation of the Treaty through State-to-State arbitration prior to an investor-State arbitration, to try to deter an investor from bringing a claim; during an investor-State arbitration, to influence the outcome of that case; or after an investment tribunal has issued its award, to use in annulment, set-aside, or enforcement proceedings. This Tribunal should decline Ecuador's invitation to undermine previously issued



awards or to incentivize States to pursue State-to-State arbitration to deter or otherwise interfere with legitimate claims.

*Third*, deciding an interpretive issue in the absence of a genuine dispute would impede the discretion of the United States (or any treaty party in a comparable situation) to decide whether and how to interpret the BIT, and would judicialize diplomatic discussions between the Parties over the meaning of the Treaty. This would put State-to-State arbitration on a hair-trigger, preempting consultations and chilling the very dialogue the Treaty was meant to encourage.

*Fourth*, hearing Ecuador's claim would create a clear roadmap for manufacturing claims in State-to-State arbitration, thereby disrupting the proper operation of international treaties. Ecuador's claims, if accepted, could have an unintended multiplier effect, establishing a novel avenue for States to invoke arbitral tribunals to force interpretations of countless treaties containing similar dispute-settlement provisions, including hundreds, if not thousands, of bilateral investment treaties.

Not a single case on which Ecuador relies involves an international court or tribunal purporting to issue an "authoritative interpretation" of a treaty in a case such as this one, where (1) no concrete case exists, (2) the parties are not in positive opposition, and (3) the treaty did not expressly confer advisory, appellate or referral jurisdiction on the tribunal. Indeed, the United States is aware of one only case in which an arbitral tribunal, acting under a similar compromissory clause, addressed a request for an "authoritative" interpretation of a treaty in

similar circumstances.<sup>8</sup> Significantly, that tribunal *rejected* the request, concluding that it could not pronounce on abstract legal questions without impermissibly engaging in judicial lawmaking. This Tribunal should follow this sound reasoning and avoid throwing open the door to the judicialization of diplomacy.

Based on Ecuador's own admissions, this case is unprecedented, improper, and jurisdictionally defective. This case should not proceed to a merits hearing. The United States would be prejudiced, and Ecuador vindicated in its approach, if the Parties were required to complete briefs on the merits and argue the interpretation of Article II(7) prior to the Tribunal's ruling on its jurisdiction. Such a result would unfairly grant Ecuador much of the relief it has requested even before it has proven this Tribunal's jurisdiction. Accordingly, this Tribunal should promptly dismiss Ecuador's claim at this stage and award the United States the full costs of these proceedings.

## **I. STATEMENT OF FACTS<sup>9</sup>**

### **A. *Chevron v. Ecuador***

This case stems from an *ad hoc* investment arbitration that two U.S. investors, Chevron and Texaco, brought in 2006 against Ecuador.<sup>10</sup> The Claimants alleged that the Ecuadorian courts' delays of more than 13 years in adjudicating seven separate contract claims breached Ecuador's obligations under the BIT.

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<sup>8</sup> *Cases of Dual Nationality*, Anglo-Italian Conciliation Commission, Decision No. 22 (May 8, 1954), XIV UN REPS. INT'L ARB. AWARDS 27 (2006) [R-30].

<sup>9</sup> Although the United States disagrees with certain of Ecuador's factual representations, the United States does not in this Memorial present other facts because it considers that, even taking Ecuador's representations as correct, there is no "dispute" for purposes of Article VII and, hence, manifestly no jurisdiction in this case. If Ecuador alleges additional facts, the United States reserves the right to present any necessary rebuttal evidence.

<sup>10</sup> *Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador*, PCA/UNCITRAL, Partial Award on the Merits (Mar. 30, 2011) ("*Chevron* Partial Award") [R-1]. The Tribunal's recitation of the relevant facts is set out in Section G of the *Chevron* Partial Award.

The case was heard by a tribunal comprising Albert Jan van den Berg, Charles N. Brower, and Karl-Heinz Böckstiegel (presiding). As Ecuador itself recently acknowledged, “the Arbitral Tribunal was composed of three eminent arbitrators with stellar reputations . . . who demand considerable respect in the arbitration community.”<sup>11</sup>

Ecuador contested jurisdiction on several grounds, including that the Claimants’ claims fell outside the *ratione materiae* scope of the BIT and constituted an abuse of process.<sup>12</sup> Ecuador argued “that simply making an arbitration demand stating that a dispute exists is insufficient to invoke the BIT.”<sup>13</sup> Ecuador further argued that the tribunal “should not limit itself to the bare allegations presented by the Claimants.”<sup>14</sup> Instead, “the Tribunal should require the Claimants to prove the facts necessary to jurisdiction to a level of preponderance of the evidence.”<sup>15</sup>

The tribunal accepted Ecuador’s arguments that a party cannot unilaterally manufacture a dispute and that a claimant must prove that its claims fall within the tribunal’s jurisdiction.<sup>16</sup> The tribunal thus carefully evaluated whether the Claimants had established the existence of a “dispute . . . arising out of or relating to . . . an alleged breach of any right conferred or created by this Treaty with respect to an investment.”<sup>17</sup> The Tribunal found that the Claimants had done so, and thus confirmed its jurisdiction.

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<sup>11</sup> Plaintiff’s Writ of Summons, *Ecuador v. Chevron*, Cause-List No. 2011/402, ¶ 29 (July 7, 2011), District Court of The Hague (unofficial English translation) [R-31].

<sup>12</sup> *Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador*, PCA/UNCITRAL, Interim Award ¶ 76 (Dec. 1, 2008) (“*Chevron* Interim Award”) [R-32].

<sup>13</sup> *Id.* ¶ 94 (quoting Ecuador’s First-Round Post-Hearing Brief on Jurisdiction of July 22, 2008) (internal quotations omitted) [R-32].

<sup>14</sup> *Id.* ¶ 95 [R-32].

<sup>15</sup> *Id.* ¶ 97 [R-32].

<sup>16</sup> *See id.* ¶ 177 [R-32].

<sup>17</sup> *Id.* [R-32].

In a June 2010 partial award, the tribunal found Ecuador in violation of its obligations under the Treaty. In particular, the tribunal found that the Ecuadorian courts' unjustified failure to hear the seven contract claims violated Ecuador's obligations under Article II(7) of the Treaty to "provide effective means of asserting claims and enforcing rights with respect to investment, investments agreements, and investment authorizations."<sup>18</sup> The tribunal concluded:

[I]t is the nature of the delay, and the apparent unwillingness of the Ecuadorian courts to allow the cases to proceed that makes the delay in the seven cases undue and amounts to a breach of the BIT by [Ecuador] for failure to provide "effective means" in the sense of Article II(7). In particular, the Tribunal finds the existence of long delays, even after official acknowledgements by the courts that they were ready to decide the cases, to be a decisive factor demonstrating that the delays experienced by [Texaco's Ecuadorian subsidiary] are sufficient to breach the BIT. The Tribunal ultimately concludes that the Ecuadorian courts have had ample time to render a judgment in each of the seven cases and have failed to do so.<sup>19</sup>

Having thus resolved a concrete dispute between two parties in positive opposition over their rights and obligations under the Treaty, the tribunal rendered a final award on damages in August 2011.<sup>20</sup>

On July 7, 2010, Ecuador brought a claim before the District Court of The Hague, in the place of arbitration, to set aside the interim and partial awards.<sup>21</sup> Ecuador contends, among other things, that the tribunal committed legal error by finding a breach of Article II(7) under the

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<sup>18</sup> *Chevron* Partial Award ¶¶ 255-56 [R-1].

<sup>19</sup> *Id.* ¶ 262 [R-1].

<sup>20</sup> *Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador*, PCA/UNCITRAL, Final Award (Aug. 31, 2011) [R-33]. The tribunal awarded Claimants approximately \$77.7 million for damages caused by Ecuador's breach of Article II(7) of the Treaty, plus approximately \$18.6 million in interest. *Id.* at pp. 141-42. The total award is approximately 6% of the US\$1.6 billion Claimants had requested. See *Chevron* Partial Award ¶ 33.14 [R-1].

<sup>21</sup> See Plaintiff's Writ of Summons, *Ecuador v. Chevron*, Cause-List No. 2011/402 (July 7, 2011), District Court of The Hague (unofficial English translation) [R-31]. See also Defendant's Statement of Defense dated Mar. 23, 2011 (unofficial English translation) [R-34]; Plaintiff's Statement of Reply dated June 29, 2011 (unofficial English translation) [R-35]; Defendant's Statement of Rejoinder dated Aug. 10, 2011 (unofficial English translation) [R-36].

Treaty and that this error was so significant as to justify setting aside the partial award.<sup>22</sup>

Although those proceedings remain ongoing,<sup>23</sup> Ecuador nevertheless commenced this State-to-State arbitration.

## **B. Ecuador Demands a Joint Interpretation of Article II(7) of the Treaty**

On June 8, 2010, Ecuador's Foreign Minister sent, by diplomatic note, a letter to the U.S. Secretary of State, expressing Ecuador's disagreement with the *Chevron* tribunal's partial award. The letter stated, in Ecuador's English translation:

The Government of the Republic of Ecuador disagrees with many aspects of the partial award but is particularly concerned with the tribunal's erroneous interpretation and application of Article II.7 of the Treaty.<sup>24</sup>

Ecuador then offered its own interpretation of Article II(7), arguing that:

- (1) The obligations under Article II(7) "are not greater than those required to implement obligations under the standards of customary international law";
- (2) Article II(7) refers to "the provision of a framework or system under which claims may be asserted and rights enforced, but does not create obligations [on] the Parties to the Treaty to assure that the framework or system provided is effective in particular cases"; and
- (3) Article II(7) does not "permit arbitral tribunals . . . to substitute their judgment of rights under municipal law for the judgments of municipal courts."<sup>25</sup>

Ecuador requested that the United States "confirm" Ecuador's interpretation, and concluded its note with the following demand:

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<sup>22</sup> See Plaintiff's Writ of Summons, *Ecuador v. Chevron*, District Court of The Hague, Cause-List No. 2011/402, ¶¶ 111, 113 (arguing that the *Chevron* tribunal's "misinterpretation" of Article II(7) "constitutes another breach of the Tribunal's mandate, which again is sufficient ground to set aside the Partial Award[.]" (unofficial English translation) [R-31].

<sup>23</sup> Transcript of Preparatory Meeting, Mar. 21, 2012, p. 15 (statement of Ecuador's counsel) ("Ecuador has challenged [the *Chevron* partial] award in the proper manner, before the Dutch courts, which have heard all the arguments and now have the matter under their advisement.").

<sup>24</sup> Patiño Letter, at p. 1 [R-2].

<sup>25</sup> *Id.* at p. 3 [R-2].

If such a confirming note is not forthcoming or otherwise the Illustrious Government of the United States does not agree with the interpretation of Art. II.7 of the Treaty by the Government of the Republic of Ecuador, an *unresolved dispute must be considered to exist* between the Government of the Republic of Ecuador and the Government of the United States of America concerning the interpretation and application of the Treaty.<sup>26</sup>

Days after Ecuador sent its diplomatic note, Mr. Luis Gallegos, Ecuador's then-ambassador to the United States, met with the Legal Adviser of the U.S. Department of State and reiterated Ecuador's demand.

Two months later, in August 2010, the United States sent a reply diplomatic note to Ecuador's Foreign Minister, attaching a letter from the U.S. Assistant Secretary of State for Western Hemisphere Affairs.<sup>27</sup> That letter stated that "the U.S. government is currently reviewing the views expressed in your letter and considering the concerns that you have raised," and that it "look[ed] forward to remaining in contact" on the matter.<sup>28</sup>

At no time did Ecuador invoke Article V of the Treaty to address its concerns. Under that provision the Parties "agree to consult promptly, on the request of either, . . . to discuss any matter relating to the interpretation or application of the Treaty."

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<sup>26</sup> *Id.* at p. 4 (emphasis added) [R-2].

<sup>27</sup> Letter from U.S. Assistant Secretary of State for Western Hemisphere Affairs Arturo A. Valenzuela to Ecuadorian Minister for Foreign Affairs, Trade and Integration Ricardo Patiño Aroca (Aug. 23, 2010) ("Valenzuela Letter") [R-3].

<sup>28</sup> *Id.* at p. 3 [R-3].

### C. Ecuador Simultaneously Threatens to Terminate the Treaty

At the same time Ecuador was demanding confirmation of its own interpretation of the BIT, its government was publicly condemning that very Treaty. Ecuador's rhetoric, in fact, accompanied specific action. Beginning in 2007, the Ecuadorian government:

- Tasked a Special Commission to review each of its 23 BITs;<sup>29</sup>
- Publicly stated its intention not to renew its BIT with the United States;<sup>30</sup>
- Provided notice that it no longer consented to ICSID arbitration of disputes concerning natural resources, such as gas, oil, and minerals;<sup>31</sup>
- Threatened to expel from Ecuador any foreign companies that initiated arbitration proceedings against the State;<sup>32</sup>
- Formally denounced the ICSID Convention;<sup>33</sup>
- Requested that its parliament terminate 13 BITs, including its BIT with the United States;<sup>34</sup>
- Formally denounced its BITs with France, Sweden, Germany, and the United Kingdom;<sup>35</sup>

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<sup>29</sup> Jonathan Hamilton *et al.*, *Investment Arbitration in Latin America: Treaty Developments Related to Bolivia, Ecuador and Venezuela*, INT'L DISP. Q., Fall 2007, at p. 6 [R-78].

<sup>30</sup> Luke Eric Peterson, *Ecuador Announces that it Wants out of US Investment Treaty*, INVESTMENT TREATY NEWS, (May 9, 2007), available at [http://www.iisd.org/pdf/2007/itn\\_may9\\_2007.pdf](http://www.iisd.org/pdf/2007/itn_may9_2007.pdf) (citing a report "that Ecuador's Foreign Affairs Minister Maria Espinosa has announced that her Government does not wish to maintain the treaty with the United States") [R-97].

<sup>31</sup> Letter from María Fernanda Espinosa Garcés, Minister of Foreign Affairs, Commerce, and Integration, to Ana Palacio, Secretary General of ICSID, dated November 23, 2007, *reprinted at* 47 I.L.M. 162 (2008) (notifying ICSID that Ecuador "will not consent to submit to the jurisdiction [of ICSID] disputes that arise in matters concerning the treatment of an investment in economic activities arising out of the exploitation of natural resources such as oil, gas, minerals or others") (translation by counsel) [R-98].

<sup>32</sup> Joshua M. Robbins, *Ecuador Withdraws from ICSID Convention* (Aug. 12, 2009), available at <http://us.practicallaw.com/2-422-1266> [R-99].

<sup>33</sup> ICSID News Release, *Ecuador Submits a Notice under Article 71 of the ICSID Convention* (July 9, 2009), available at <http://icsid.worldbank.org/ICSID> ("On July 6, 2009, the World Bank received a written notice of denunciation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) from the Republic of Ecuador.") [R-100].

<sup>34</sup> "Solo Finlandia se ha llegado a finalizar el tratado de inversiones" (Apr. 26, 2011), <http://www.eluniverso.com/2011/04/26/1/1356/solo-finlandia-ha-llegado-finalizar-tratado-inversiones.html> (noting intention to terminate BITs with Finland, Sweden, Canada, China, the Netherlands, Germany, France, the United Kingdom, Argentina, Chile, Venezuela, Switzerland, and the United States) [R-101].

- Terminated its BIT with Finland;<sup>36</sup> and
- Announced its intention to terminate all of Ecuador’s remaining BITs, citing their “prejudicial nature.”<sup>37</sup>

In January 2010, President Correa asked Ecuador’s Constitutional Court to rule on the constitutionality of various provisions of the U.S.-Ecuador BIT, in conjunction with his government’s planned denunciation of that Treaty.<sup>38</sup> President Correa condemned the BIT as harmful to the Republic, citing a principle in Ecuador’s new Constitution that expressly “rejects converting disputes with foreign private companies into conflicts between States.”<sup>39</sup>

In a November 25, 2010 decision, the Constitutional Court declared unconstitutional the BIT’s investor-State and State-to-State provisions.<sup>40</sup> The Court ruled that both provisions “violate the principle of the supremacy of the Constitution,” especially “given the binding nature of arbitral decisions called for in this instrument.”<sup>41</sup> The creation of such tribunals, the Court

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> “Inversion: acuerdos con EEUU y Caracas a revision” (Nov. 30, 2010), <http://www.hoy.com.ec/noticias-ecuador/fin-a-los-acuerdos-de-inversion-444546.html> [R-102]; “Ecuador derogara todos sus tratados de inversion bilaterales” (Nov. 28, 2010), *available at* [http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news\\_user\\_view&id=138719&umt=ecuador\\_derogara\\_todos\\_tratados\\_inversion\\_bilaterales](http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=138719&umt=ecuador_derogara_todos_tratados_inversion_bilaterales); El Ciudadano, “Presidente: ‘Chevron persigue al Ecuador’” (June 23, 2010) [http://www.elciudadano.gob.ec/index.php?option=com\\_content&view=article&id=14198:presidente-qchevron-persigue-al-ecuadorq&catid=1:archivo](http://www.elciudadano.gob.ec/index.php?option=com_content&view=article&id=14198:presidente-qchevron-persigue-al-ecuadorq&catid=1:archivo) [R-102].

<sup>38</sup> See Letter Number T.4766-SNJ-10-21 from President Correa to the President of the Constitutional Court, dated Jan. 6, 2010 (contending that the U.S. and other BITs “contain clauses that contradict the Constitution, conspire against the national interest, and force the Ecuadorian state to participate in international arbitrations to resolve conflicts,” and requesting “a favorable opinion to denounce the Bilateral Investment Treaties”) [R-13].

<sup>39</sup> Opinion No. 043-10-DTC-CC, Case No. 0013-10-71, Opinion of the Constitutional Court, at pp. 11,13 (Nov. 25, 2010) (citing Article 416 of Ecuador’s 2008 Constitution) (English translation of Spanish original) [R-14].

<sup>40</sup> *Id.* at p. 23 (“The provisions contained in Articles VI (2), subparagraphs a), b) and c), and VII and X of the *Treaty between the Republic of Ecuador and the United States of America Concerning the Encouragement and Reciprocal Protection of Investment* are judged to be unconstitutional Articles VI(2)(a), (b), and (c)”) (English translation of Spanish original). *Id.* The Constitutional Court further concluded that, as a matter of Ecuadorian law, termination of the BIT required approval by the National Assembly. *Id.* [R-14].

<sup>41</sup> *Id.* at p. 19 (English translation of Spanish original) [R-14].



concluded, is “an attack on the sovereignty of the people expressed through the Constitution of the Republic.”<sup>42</sup>

Thus, just prior to commencing this arbitration, the President of Ecuador successfully petitioned the Constitutional Court to declare unconstitutional the very Treaty provision that Ecuador now relies upon as the exclusive basis for establishing jurisdiction in this arbitration.

The Parties’ diplomatic relationship reached a low point in April 2011, when Ecuador declared the U.S. ambassador to Ecuador *persona non grata* and ordered her immediate departure from Ecuador.<sup>43</sup> This action, which the United States deemed “unjustified,” prompted a reciprocal response from the United States.<sup>44</sup>

Ecuador’s demand for confirmation of its interpretation of the Treaty should be viewed against this background. The Parties agree that the United States did not express a view on Ecuador’s interpretation of Article II(7) in the August 2010 U.S. diplomatic note, in the accompanying letter, or thereafter.<sup>45</sup> Following the United States’ August 2010 diplomatic note, there were no further formal communications between the Parties on this matter before June 28, 2011, when Ecuador commenced this arbitration. Ecuador never responded in writing to the United States’ diplomatic note, and never requested consultations under Article V of the Treaty.

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<sup>42</sup> *Id.* (English translation of Spanish original) [R-14].

<sup>43</sup> Simon Romero, *Ecuador Expels U.S. Ambassador Over WikiLeaks Cable*, N.Y. TIMES (Apr. 5, 2011), <http://www.nytimes.com/2011/04/06/world/americas/06ecuador.html> [R-105].

<sup>44</sup> See U.S. State Department Daily Press Briefing (Apr. 7, 2011) (“[T]he unjustified action of the Ecuadorian Government in declaring Ambassador Hodges *persona non grata* left us no other option than this reciprocal action.”) [R-106].

<sup>45</sup> Transcript of Preparatory Meeting, Mar. 21, 2012, at p. 11 (The United States “did not respond further to Ecuador’s request and never advised Ecuador of its interpretation of Article II(7).”) (statement of Ecuador’s counsel).

## II. ARGUMENT

### A. Ecuador's Claims Fall Outside the Scope of Article VII Because There Is No "Dispute Between the Parties Concerning the Interpretation or Application of the Treaty"

This arbitration presents the threshold question of whether Ecuador is entitled under Article VII of the BIT to convene an international arbitral tribunal to render an "authoritative interpretation" of Article II(7) if the United States remains silent or fails to agree with Ecuador's unilateral statement concerning the meaning of that provision. Ecuador is not so entitled. An arbitral tribunal's jurisdiction rests on the common and unequivocal consent of the disputing Parties, and the United States never consented to submit purely advisory matters of this kind to arbitration under Article VII.<sup>46</sup>

Ecuador does not allege any facts establishing a dispute with the United States over the "interpretation or application" of Article II(7) of the Treaty. Rather, Ecuador admits that its "dispute" is not with the United States, but with the award rendered by the *Chevron* tribunal, an investor-State tribunal constituted under Article VI. Ecuador suggests that when an investment tribunal renders an "erroneous" award, Ecuador has the right to proclaim the "proper" interpretation, seek confirmation of its proclamation from its treaty partner, and, failing the reply it demanded, put the issue to an Article VII tribunal for an "authoritative interpretation." Yet nothing in Article VII of the BIT or in general international law supports this remarkable

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<sup>46</sup> See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, 1993 I.C.J. 325, 341-42 (Order on Provisional Measures of Sept. 13) (citing cases requiring an "unequivocal indication of a voluntary and indisputable acceptance" of consent) (internal quotation marks omitted) [R-37]. See also BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 261 (1987) (observing that "the principle of competence requires that a tribunal should decide [jurisdiction] strictly in accordance with its constitutional law, on pain of nullity") [R-79]; *Grimm v. Iran*, Case No. 71, Award No. 25-71-1 (Feb. 18, 1983), 2 IRAN-U.S. CL. TRIB. REP. 78, 80 (1983) (holding that if Iran and the United States "had intended to bring [the claims] within the ambit of the Tribunal's jurisdiction, it can be assumed that they would have done so by incorporating express language to that effect.") [R-38]; *Ethyl Corp. v. Canada*, UNCITRAL/NAFTA, Award ¶ 59 (June 24, 1998) ("The sole basis of jurisdiction under NAFTA Chapter 11 in an arbitration under the UNCITRAL Arbitration Rules is the consent of the Parties.") [R-39].

proposition, which is contradicted by the plain meaning of Article VII, read in context and in light of the Treaty's object and purpose, as well as nearly a century of unbroken international jurisprudence.

**1. Under the Ordinary Meaning of Article VII, Read in Context and in Light of the Treaty's Object and Purpose, There Is No "Dispute" Between the Parties Under Article VII**

Ecuador's request for arbitration does not present a "dispute" between the Parties within the ordinary meaning of Article VII of the BIT, read in context and in light of the Treaty's object and purpose, as required by Article 31(1) of the Vienna Convention on the Law of Treaties.<sup>47</sup>

Article VII of the BIT states:

Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law.

By its terms, Article VII applies only to a "dispute" between the Parties concerning the interpretation or application of the Treaty.

**i. The Ordinary Meaning of "Dispute" Does Not Encompass Ecuador's Claims**

The use of the term "dispute" in the text of Article VII, together with the fact that the Tribunal is to render a "binding decision," demonstrate the Parties' intention to create contentious jurisdiction, rather than advisory, appellate, or referral jurisdiction. The leading

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<sup>47</sup> See Vienna Convention on the Law of Treaties, art. 31(1) (May 23, 1969), 1155 U.N.T.S. 331 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.") [R-15]. Although the United States is not a party to the Vienna Convention, it has recognized since at least 1971 that the Convention is the "authoritative guide" to treaty law and practice. See Letter of Submittal from Secretary of State Rogers to President Nixon transmitting the Vienna Convention on the Law of Treaties, Oct. 18, 1971, S. Ex. L. 92d Cong., 1st Sess., *reprinted in* 65 DEP'T ST. BULL. No. 1694, Dec. 13, 1971, at 684, 685 [R-107]. The International Court of Justice has determined that Article 31 of the Vienna Convention reflects customary international law. See, e.g., *Kasikili/Sedudu Island (Botswana v. Namibia)*, 1999 I.C.J. 1045, 1059 (Judgment of Dec. 13) [R-40].

English-language legal dictionary defines “dispute” as “a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other.”<sup>48</sup> As Professor Tomuschat explains in the accompanying expert report, the word “dispute” has “obtained a specific meaning in international practice,” requiring that the parties to a treaty have put themselves in positive opposition with one another over a concrete case involving a claim of breach under the treaty.<sup>49</sup> None of these conditions is present here.

A “dispute” concerning the interpretation or application of the Treaty cannot arise in the abstract. While issues regarding the “interpretation” or “application” of the Treaty may be presented and adjudicated in any arbitration pursuant to Article VII, either independently or in combination, they must stem from an actual controversy. Article VII does not grant the Tribunal any form of jurisdiction that might allow for the determination of general or theoretical matters. Here, Ecuador’s claim fails because it presents nothing more than abstract legal questions about the general meaning of Article II(7).

Disputes under Article VII must be “between the Parties.” According to the plain terms of Article VII, any conflict of claims or rights must therefore be directed against the other Party. The conflict cannot arise out of a separate controversy or a dispute with a third party. Here, however, Ecuador admits that its problem is with the *Chevron* tribunal’s interpretation of Article

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<sup>48</sup> BLACK’S LAW DICTIONARY 327 (6th ed. 1991) [R-108]. See also 1 SHORTER OXFORD ENGLISH DICTIONARY 709 (5th ed. 2002) (defining “dispute” as “[a]n instance of dispute or arguing against something or someone ...; esp. ... a disagreement in which opposing views are strongly held”) [R-109].

<sup>49</sup> Expert Opinion of Professor Christian Tomuschat dated April 24, 2012, ¶¶ 5-7 (“Tomuschat Opinion”) (citing cases).

II(7), and not with the United States, which Ecuador agrees has not failed to perform under the Treaty.<sup>50</sup>

The phrase “for binding decision in accordance with the applicable rules of international law” confirms that Article VII covers *legal* and not *political* disputes. A “dispute” under Article VII thus requires a *conflict of claims or rights* between the Parties based on the Treaty that is capable of binding resolution by application of legal rules and principles. Article VII does not contemplate resolution of a political disagreement between the Parties about whether to interpret Article II(7).

## **ii. The Treaty’s Context Confirms the Absence of a “Dispute”**

Other provisions of the Treaty provide essential context for interpreting Article VII.

Article V states:

The Parties agree to consult promptly, on the request of either, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty.

Article V, in contrast to Article VII, thus provides a forum for the discussion of a wide range of subjects, including “any *matter* relating to the interpretation or application of the Treaty.”<sup>51</sup>

According to a leading English dictionary, a “matter” is “[a]n event, circumstance, or question, etc., which is or may be an object of consideration or practical concern.”<sup>52</sup> Unlike a “dispute,” a “matter” need not arise out of assertions by the Parties of contrary claims or rights. Use of the term “matter” in Article V thus establishes a broader scope for consultations between the Parties

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<sup>50</sup> Transcript of Preparatory Meeting, Mar. 21, 2012, at p. 18 (Ecuador “has not accused the United States of any wrongdoing” and “does not accuse the United States of violating any of its international obligations.”) (statement of Ecuador’s counsel).

<sup>51</sup> Emphasis added.

<sup>52</sup> 1 SHORTER OXFORD ENGLISH DICTIONARY 709 (5th ed. 2002) [R-109].

than dispute resolution under Article VII.<sup>53</sup> In other words, under Article V, the Parties agree to consult and negotiate about any “matters,” *i.e.*, any *issues* that might arise under the Treaty; under Article VII, by contrast, the Parties are permitted to seek adjudication of only a limited subset of those issues, namely “dispute[s] between the Parties concerning the interpretation or application of the Treaty.”<sup>54</sup> To the extent Ecuador’s claim is that the United States refused to enter into negotiations with it to agree on the meaning of Article II(7), it is Article V and not Article VII that provides the mechanism for raising that complaint. But Ecuador never invoked Article V.

Article VII must also be read in the context of Article VI, under which investors of one Party may (1) initiate arbitration against the other Party with respect to “investment disputes” concerning treatment allegedly inconsistent with obligations under the BIT, and (2) obtain a final and binding award.<sup>55</sup> Article VI sets out the jurisdictional and procedural requirements by which each Party consents to allow investors of the other Party to submit to arbitration claims against it for alleged violations of the BIT’s substantive obligations.

This provision is central to the operation of the BIT and serves as a separate, principal mechanism by which the Parties have authorized arbitral tribunals to resolve actual disputes that investors have brought directly against the host Party.<sup>56</sup> Article VI contemplates annulment or set-aside proceedings under the applicable arbitration rules and law, consistent with any relevant

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<sup>53</sup> See Tomuschat Opinion ¶¶ 13-14.

<sup>54</sup> See *id.*

<sup>55</sup> See Article VI (defining an “investment dispute” as a “dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party’s foreign investment authority to such national or company; or (c) an alleged br[e]ach of any right conferred or created by this Treaty with respect to an investment”).

<sup>56</sup> See Expert Opinion of Professor W. Michael Reisman dated April 24, 2012, ¶¶ 23-38 (“Reisman Opinion”).

treaty on the enforcement of arbitral awards, as the exclusive means for challenging awards rendered by investor-State tribunals. This confirms that a State-to-State tribunal constituted under Article VII has no appellate jurisdiction over such awards.<sup>57</sup> As Professor Reisman notes, Articles VI and VII create two distinct tracks of arbitration that “assign[] a different range of disputes exclusively to each of the tracks.”<sup>58</sup>

**iii. The Treaty’s Object and Purpose Further Confirms the Absence of a “Dispute”**

The limited scope of Article VII is further confirmed by the Treaty’s object and purpose, which first and foremost is “the encouragement and reciprocal protection of investment.”<sup>59</sup> Although Article VI serves as the main avenue for resolving disputes concerning a Party’s failure to comply with its obligations under the Treaty,<sup>60</sup> Article VII remains a residual procedural mechanism for ensuring Party compliance with the Treaty in limited circumstances. Article VII may be invoked, for example, to resolve a dispute over a Party’s non-payment of an investor-State arbitration award in violation of Article VI(6) of the Treaty.<sup>61</sup> It may not be invoked, by contrast, to exercise any form of advisory, appellate or referral jurisdiction, given the express limitations on the Tribunal’s contentious jurisdiction.

The ordinary meaning of Article VII, read in context and in light of the Treaty’s object and purpose, thus confirms that this Tribunal has jurisdiction only to adjudicate a (1) concrete

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<sup>57</sup> Article VI(6). *See also infra*, Part II.C.2.

<sup>58</sup> Reisman Opinion ¶ 23.

<sup>59</sup> The BIT is entitled “Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investments.”

<sup>60</sup> *See* KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 24-30 (2009) [R-11].

<sup>61</sup> Article VI(6) of the Treaty states: “Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.”

case alleging a violation of the Treaty by one Party that is (2) positively opposed by the other Party. Ecuador has failed to satisfy either requirement. To find otherwise would contravene the longstanding rule that treaty parties are bound by a compromissory clause, like the one in Article VII, “only within the limits of what can be clearly and unequivocally found in [its] provisions.”<sup>62</sup> “[I]n case of doubt, [these provisions] are to be interpreted in favor of the natural liberty and independence of the party concerned.”<sup>63</sup>

## **2. A “Dispute” Requires a “Concrete Case” Alleging a Treaty Violation**

Ecuador cannot bring an international claim under the contentious jurisdiction of Article VII, because it cannot establish (and has not alleged) the existence of a “dispute” concerning the United States’ failure to comply with the Treaty. There must be, in other words, an *actual controversy* before the Tribunal concerning a Party’s alleged breach of the Treaty. A “dispute” must be *concrete* in the sense that one Party claims that the other Party’s act or omission has violated its legal rights, thereby warranting judicial relief capable of affecting the Parties’ rights and obligations.

This requirement of a “concrete case” concerning an alleged treaty violation has been recognized by nearly every form of international dispute-settlement tribunal, from investor-State

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<sup>62</sup> See Arbitral Decision Rendered in Conformity with the Special Agreement Concluded on December 17, 1939, Between the Kingdom of Sweden and the United States of America Relating to the Arbitration of a Difference Concerning the Swedish Motor Ships *Kronprins Gustaf Adolf* and *Pacific*, reprinted in 26 AM. J. INT’L L. 834, 846 (1932) [R-41]. See also *Ambatielos Case* (Greece v. U.K.), 1952 I.C.J. 27, 39 (Preliminary Question of July 1) (expressing “no doubt that in the absence of a clear agreement between the Parties [regarding their consent to be bound], the Court has no jurisdiction to go into all the merits[.]” [R-42]); *Interpretation of Peace Treaties* (Second Phase), 1950 I.C.J. 221, 227 (Advisory Opinion of July 18) (noting that agreements to arbitrate between States “must be strictly construed and can be applied only in the case expressly provided for therein”) [R-43].

<sup>63</sup> *Swedish Motor Ships Decision*, 26 AM. J. INT’L L. at p. 34 [R-41].



to State-to-State tribunals, to protect States “from international litigation that is unnecessary, premature, inadequately motivated, or merely specious.”<sup>64</sup>

Ecuador’s request is so extraordinary, in fact, that the United States was able to identify only one case that has squarely addressed the question before this tribunal – the Anglo-Italian Conciliation Commission’s 1954 decision in the *Dual Nationality Cases* – and that tribunal determined that it lacked jurisdiction.<sup>65</sup> Interpreting a compromissory clause with virtually identical operative language as the one at issue here,<sup>66</sup> the Commission was confronted with a request by the United Kingdom to interpret the meaning of a provision of the underlying peace treaty related to its scope of coverage, outside the context of a concrete case. The Commission concluded that it could never address such legal questions in the abstract, lest it improperly engage in judicial lawmaking. The Commission therefore rejected the United Kingdom’s request for an “authoritative” interpretation, concluding:

An interpretation according to which the Commission would also have the faculty to interpret the [Treaty] in an abstract and general manner, with obligatory effect for all future cases, would run the risk, because it is abusive, of ending in a judgement blemished by excess of power (it would create rules of law, which is not a jurisdictional function, but a legislative function), a very serious position in our case . . . .<sup>67</sup>

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<sup>64</sup> As Judges Spender and Fitzmaurice observed:

[R]equirements about “disputes” . . . are not mere technicalities. They appear in one form or another in virtually every adjudication clause that has ever been drafted, and for good reason. They are inserted purposely to protect the parties, so far as possible, from international litigation that is unnecessary, premature, inadequately motivated, or merely specious. Without this measure of protection, countries would not sign clauses providing for compulsory adjudication.

Joint Dissenting Opinion of Judges Spender and Fitzmaurice, *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, 1962 I.C.J. 319, 563 (Judgment on Preliminary Objections of Dec. 21) [R-5].

<sup>65</sup> *Cases of Dual Nationality*, XIV UN REPS. INT’L ARB. AWARDS 27 [R-30].

<sup>66</sup> See 1947 Peace Treaty Between the Allied Associated Powers and Italy, art. 83(2) (“When any Conciliation Commission is established under paragraph 1 above, it shall have jurisdiction over all *disputes* which may thereafter arise between the United Nation concerned and Italy in the *application or interpretation* of Articles 75 and 78 and Annexes XIV, XV, XVI, and XVII, part B, of the present Treaty, and shall perform the functions attributed to it by those provisions.”) (emphasis added) [R-16].

<sup>67</sup> *Cases of Dual Nationality*, XIV UN REPS. INT’L ARB. AWARDS, at p. 34 [R-30].

If this Tribunal were to address Ecuador's question regarding the meaning of Article II(7) in the abstract, contrary to the requirements of Article VII, it would similarly exceed the boundaries of its judicial function and thrust this Tribunal into general lawmaking under the Treaty.

The International Court of Justice has emphasized the importance of a concrete case for establishing its contentious jurisdiction. The ICJ opined in *Northern Cameroons* that while its general function is to state the law, its contentious jurisdiction allows it to “pronounce judgment *only* in connection with *concrete cases* where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties.”<sup>68</sup>

In his separate opinion in *Northern Cameroons*, Judge Fitzmaurice, one of the Court's most esteemed jurists, described the basis for the Court's proper role in deciding concrete cases.

He observed that:

courts of law are not there to make legal pronouncements in *abstracto* . . . [but] are there to protect existing and current legal rights, to secure compliance with existing and current legal obligations, to afford concrete reparation if a wrong has been committed, or to give rulings in relation to existing and continuing legal situations.<sup>69</sup>

According to Judge Fitzmaurice, a “dispute” must be more than a “mere divergence of view about matters of theoretical, scientific or academic interest.”<sup>70</sup> At a minimum:

one party should be making, or should have made, a complaint, claim, or protest about an act, omission or course of conduct, present or past, of the other party, which the latter refutes, rejects, or denies the validity of, either expressly, or else implicitly by persisting in the acts, omissions or conduct complained of, or by failing to take the action, or make the reparation, demanded.<sup>71</sup>

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<sup>68</sup> *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)*, 1963 I.C.J. 13, 34 (Judgment on Preliminary Objections of Dec. 2) (emphasis added) [R-10].

<sup>69</sup> *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)*, 1963 I.C.J. at 98-99 (Separate Opinion of Judge Sir Gerald Fitzmaurice of Dec. 3) [R-44].

<sup>70</sup> *Id.* at 110 [R-44].

<sup>71</sup> *Id.* at 109 [R-44].

The same “concreteness” concept is found in the World Trade Organization’s dispute settlement system, which is recognized as “a central element in providing security and predictability to the multilateral trading system.”<sup>72</sup> That system “serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.”<sup>73</sup> As the Dispute Settlement Understanding makes clear, “[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute.”<sup>74</sup> A “dispute” arises in “situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member[.]”<sup>75</sup> WTO dispute settlement thus provides for the resolution of actual conflicts of legal rights and obligations between Members with regard to a covered agreement.<sup>76</sup>

Investor-State tribunals similarly condition their jurisdiction on a finding of an actual controversy in a concrete case. The tribunal in *Maffezini v. Spain*, for instance, concluded that a “dispute must relate to clearly identified issues between the parties and must not be merely

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<sup>72</sup> World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3.2 (“Dispute Settlement Understanding”) [R-17]. See also Luiz Olavo Baptista, *Use of Arbitration in the WTO*, LIBER AMICORUM BERNARDO CREMADES 925 (M.Á. Fernández-Ballestros & David Arias eds. 2010) (“DSU Article 7.3 clearly encourages mutually agreed solutions between parties, but in the absence of such solutions, the dispute settlement system will seek to apply the covered agreements to the inappropriate measures.”) [R-81].

<sup>73</sup> Dispute Settlement Understanding, art. 3.2 [R-17].

<sup>74</sup> *Id.*, art. 3.7 [R-17].

<sup>75</sup> *Id.*, art. 3.3; see also *id.*, art. 23 (“When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding” and shall “not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding . . . .”) [R-17].

<sup>76</sup> Article 3.9 of the Dispute Settlement Understanding makes clear that “[t]he provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.” *Id.* [R-17].

academic.”<sup>77</sup> The “dispute” thus “must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim.”<sup>78</sup>

In his comprehensive survey of ICSID jurisprudence, Professor Schreuer similarly observed:

The disagreement between the parties must also have some practical relevance to their relationship and must not be purely theoretical. It is not the task of the Centre to clarify legal questions *in abstracto*. . . . The dispute must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim.<sup>79</sup>

Other *ad hoc* tribunals similarly require an actual controversy between the parties before them as an essential condition of jurisdiction. In the *Aminoil* arbitration, for instance, the issue arose as to whether a “dispute” capable of settlement had arisen between the parties prior to the

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<sup>77</sup> *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction ¶ 94 (Jan. 25, 2000) (English translation of Spanish original) (citing CHRISTOPH SCHREUER, ICSID CONVENTION: A COMMENTARY 337 (1996)) [R-45].

<sup>78</sup> *Id.* See also *MCI Power Group L.C. v. Ecuador*, ICSID Case No. ARB/03/6, Award ¶ 63 (July 31, 2007) (“The Tribunal recognizes that under the general international law applicable, a dispute means a disagreement on a point of fact or of law, a conflict of legal opinions or of interests as between the parties.”) (citing cases) [R-46]; *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Award ¶ 249 (Aug. 21, 2007) (establishing standard) [R-47]; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction ¶¶ 34, 37 (May 16, 2006) (noting that a “legal dispute, in the ordinary meaning of the term, is a disagreement about legal rights or obligations,” and concluding that Claimants had “clearly base[d] their case on legal rights which they allege have been granted to them under the bilateral investment treaties that Argentina has concluded with France and Spain.”) [R-48]; *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction ¶ 67 (Feb. 22, 2006) (“In this case, the Claimant invokes specific legal acts and provisions as the foundation of its claim: it indicates that certain measures by Argentina have affected its legal rights stemming from contracts, legislation and the BIT. The Claimant further indicates specific provisions of the BIT granting various types of legal protection to its investments in Argentina, that in its view have been breached by those measures.”) [R-49]; *Empresas Lucchetti S.A. and Lucchetti Peru S.A. v. Republic of Peru*, ICSID Case No. ARB/03/04, Award ¶ 48 (Feb. 7, 2005) (“[A]s a legal concept, the term dispute has an accepted meaning. It has been authoritatively defined as a ‘disagreement on a point of law or fact, a conflict of legal views or of interests between two persons,’ or as a ‘situation in which two sides hold clearly opposite views concerning the question of the performance or non-performance’ of a legal obligation. In short, a dispute can be held to exist when the parties assert clearly conflicting legal or factual claims bearing on their respective rights or obligations or that ‘the claim of one party is positively opposed by the other.’”) (citing cases) [R-50]; *Impreglio v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction ¶¶ 302-03 (Apr. 22, 2005) (citing development of ICJ jurisprudence on “dispute”) [R-51]; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction ¶ 106 (Apr. 29, 2004) [R-52].

<sup>79</sup> See also Christoph SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 94 (2d ed. 2009) (citing cases) [R-82].

issuance by Kuwait of a decree nationalizing Aminoil's oil concession.<sup>80</sup> The parties' concession agreement had provided for arbitration of "any difference or dispute . . . between the Parties . . . concerning the interpretation or execution hereof, or anything herein contained or in connection herewith, or the rights or liabilities of either party hereunder."<sup>81</sup> Over many years of negotiations, the parties had expressed divergent legal positions over their rights and obligations under the concession agreement. That was not enough, however, to establish a "dispute" for purposes of jurisdiction. The Tribunal concluded that

[T]he possibility (prior to the issuing of Decree No. 124) of seizing an arbitral tribunal with the particular question over which the Parties had failed to come to an understanding . . . did not exist, because unless and until the Government took some concrete step – such as nationalisation – in consequence of that failure, there would have been no definite complaint with which to seize any arbitral tribunal . . . .<sup>82</sup>

The United States has long expressed views consistent with this unbroken jurisprudence. The United States took this position, for instance, in the 1960s, after developing a template for its modern friendship, commerce, and navigation treaties (FCN treaties). These post-war FCN treaties were precursors to BITs and contained State-to-State dispute settlement provisions nearly identical to Article VII of the Treaty.<sup>83</sup> Both types of treaties, FCN treaties and BITs, permit State-to-State dispute resolution of "disputes between the Parties concerning the interpretation or application of the Treaty." In official statements before the U.S. Senate, the U.S. government stated that "[it] is in the interest of the United States to be able to have recourse to [State-to-State

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<sup>80</sup> *In the Matter of an Arbitration Between Kuwait and the American Independent Oil Company (AMINOIL)*, Award (Mar. 24, 1982), 21 I.L.M. 976 [R-53].

<sup>81</sup> *Id.* at p. 991 [R-53].

<sup>82</sup> *Id.* at p. 1026 [R-53].

<sup>83</sup> The dispute-settlement provisions of modern FCN treaties differ from Article VII only insofar as they generally designate the ICJ, not *ad hoc* arbitration, as the preferred forum for dispute settlement.

dispute settlement] in case of *treaty violation*.”<sup>84</sup> Thus, while U.S. investors have principal responsibility for resolving investment disputes through investor-State arbitration, Article VII serves as a mechanism for the State of the investor to address concrete cases involving treaty violations.<sup>85</sup>

Ecuador itself has recognized that jurisdiction under the Treaty is premised on the existence of an actual controversy. Contrary to the position it now takes here, Ecuador argued to the *Chevron* tribunal that “simply making an arbitration demand stating that a dispute exists is insufficient to invoke the BIT.”<sup>86</sup> Ecuador cannot have it both ways: it should not be permitted to “blow hot and cold – to affirm at one time and to deny at another.”<sup>87</sup>

In this case, Ecuador has failed to establish the existence of a concrete case, as required under Article VII. By its own admission, Ecuador makes no allegation that the United States has failed to comply with the Treaty. Ecuador has stated unequivocally:

Ecuador has not accused the United States of any wrongdoing. It does not accuse the United States of violating any of its international obligations. It does not seek

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<sup>84</sup> U.S. Senate Report on Commercial Treaties with Belgium and Vietnam (Aug. 28, 1961), Appendix, Department of State Memorandum on Provisions in Commercial Treaties Relating to the International Court of Justice, at 7 (emphasis added) [R-110].

<sup>85</sup> Professor Vandeveld further observes:

The United States attempted to eliminate the problem posed by an *expropriating state*’s unwillingness to negotiate or arbitrate by including in the modern FCNs a provision granting to each party the right to adjudicate before the International Court of Justice (ICJ) any dispute between the parties arising out of the application or interpretation of the treaty. Thus, if the injury to the U.S. investor constituted a violation of [ ] one of the modern FCNs’ investment-protection provisions, the United States could institute adjudication by the ICJ of the claim despite the objections of the host state.

VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS at p. 574 (emphasis added) (internal citations omitted) [R-80].

<sup>86</sup> *Chevron* Interim Award ¶ 94 (quoting Ecuador’s First-Round Post-Hearing Brief on Jurisdiction of July 22, 2008) (internal quotations omitted) [R-32].

<sup>87</sup> BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 141 (2006 ed.) (quoting English Court of the Exchequer in *Cave v. Mills* (1862)) [R-79]. See also *Oil Field of Texas, Inc. v. Government of Iran*, Case No. 43, Award, 1 IRAN-U.S. CL. TRIB. REP. 347 (1982) (quoting same) [R-54].

compensation from the United States. It does not seek an order against the United States.<sup>88</sup>

Instead, Ecuador asks this Tribunal an entirely open-ended question, not connected to any concrete facts: “What precisely are Ecuador’s obligations under Article II(7), obligations which it did not understand it was assuming when it signed the BIT with the United States?”<sup>89</sup> Ecuador points not to an actual dispute with the United States, but to a need for guidance in its domestic implementation of the Treaty. According to Ecuador, the Tribunal’s interpretation of the Treaty will resolve such open questions as:

- “How is Ecuador to organize its court system to avoid violating its obligations under Article II(7)?”<sup>90</sup>
- “[D]oes Ecuador have to double the number of its judges?”<sup>91</sup>
- “Does it have to survey all civil cases involving foreign nationals and monitor their progress in court?”<sup>92</sup>
- “How aggressively must it act to speed up cases and by what means?”<sup>93</sup>
- “What measure is it required to adopt . . . under Article II(7) that Ecuador never intended to assume or understood that it was undertaking when it entered the BIT?”<sup>94</sup>

The questions Ecuador has put to this Tribunal provide the strongest justification for why the “concrete case” requirement is essential. These questions do not lend themselves to definitive and binding resolution, but rather to an advisory opinion. This Tribunal is not a general advisor to Ecuador on such questions as how many judges it should have or what it should do to increase

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<sup>88</sup> Transcript of Preparatory Meeting, Mar. 21, 2012, at p. 18 (statement of Ecuador’s counsel).

<sup>89</sup> *Id.* at p. 15.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at p. 16.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

the speed of adjudication within its domestic judicial system. In view of the complete lack of any alleged breach or other wrongdoing by the United States, this Tribunal should decline Ecuador's invitation to engage in judicial lawmaking, and dismiss Ecuador's request.

**3. Because the United States Has Not Positively Opposed any Allegation of Treaty Violation, There Is No "Dispute" Between the Parties**

To establish the existence of a "dispute," Ecuador must prove that the Parties are in "positive opposition" to one another in a concrete case involving a breach of the Treaty. Even if Ecuador had claimed that the United States had violated its obligations under the Treaty, Ecuador still could not establish a "dispute," as it could not establish that the Parties are in "positive opposition" over any such claim. It takes two parties to make a treaty, and two parties in disagreement over its interpretation or application to create a dispute.

Ecuador acknowledges that the United States did not affirmatively oppose Ecuador's unilateral interpretation of Article II(7) of the Treaty.<sup>95</sup> Ecuador nonetheless claims that the United States put itself in positive opposition through its silence.<sup>96</sup> Ecuador is mistaken. Silence alone cannot establish positive opposition. It is only when a party's *actions* make it obvious that its views are positively opposed to another party's views that silence might allow an objective determination of positive opposition. Ecuador itself concedes that the United States has taken *no action* whatsoever, and thus has created no positive opposition.

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<sup>95</sup> *Id.* at p. 10 (noting that the United States "never informed Ecuador that it agreed with Ecuador's interpretation of Article II(7) or, for that matter, that it disagreed with Ecuador's interpretation") (statement of Ecuador's counsel).

<sup>96</sup> *Id.* at pp. 12-13.



The definition of positive opposition is well established in international jurisprudence: it is a conflict of legal views or interests between two parties.<sup>97</sup> To find positive opposition, a tribunal must make an “objective determination” that “the claim of one party is positively opposed by the other.”<sup>98</sup> In most cases, parties put themselves in positive opposition by expressing conflicting views over an alleged breach of a treaty. In two cases, as discussed below, the ICJ found manifest positive opposition in the actions of a party, because those actions clearly showed that it had taken an opposing view with respect to an alleged breach of that party’s obligations. In all cases, both parties need to have taken positions on the underlying matter, expressly or impliedly, and those positions must contradict one another. One party cannot force another into positive opposition; nor can one party unilaterally create a dispute.

**i. “Positive Opposition” Requires that Parties Take Contradictory Positions on Obligations at Issue in a Concrete Case**

Although Ecuador asserts that “[t]he existence of a dispute can be established by a Party’s conduct alone, *including its silence*,”<sup>99</sup> the very cases Ecuador cites to support that assertion – *Georgia v. Russia*, *Cameroon v. Nigeria*, and *UN Headquarters*<sup>100</sup> – demonstrate precisely the opposite. In each case, one party had claimed that the other had breached international law obligations owed to that party – a serious allegation calling for a response.

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<sup>97</sup> *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. (ser. A) No. 2 (Judgment of Aug. 30) [R-4]; *East Timor (Portugal v. Australia)* 1995 I.C.J. 90, 99-100 (Judgment of June 30) (recognizing that a dispute can be between parties as well as persons) [R-55]. See also Tomuschat Opinion ¶ 6.

<sup>98</sup> *Interpretation of Peace Treaties (First Phase)*, 1950 I.C.J. 65, 74 (Advisory Opinion of Mar. 30) [R-6]; *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, 1962 I.C.J. at 328 [R-5]. See also *East Timor (Portugal v. Australia)*, 1995 I.C.J. 90, 100 (Judgment of June 30) [R-55]; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States)*, 1998 I.C.J. 115, 122-23 (Judgment on Preliminary Objections of Feb. 27) [R-56]; *Certain Property (Liechtenstein v. Germany)*, 2005 I.C.J. 6, 18 (Judgment on Preliminary Objections of February 10) [R-7].

<sup>99</sup> Transcript of Preparatory Meeting, Mar. 21, 2012, at p. 12 (statement of Ecuador’s counsel) (emphasis added).

<sup>100</sup> *Id.* at pp. 12-13.

This case, by contrast, involves no claim of breach of the treaty by the United States implicating the interpretation or application of Article II(7) and, hence, no requirement to respond to Ecuador's request to confirm its interpretation.<sup>101</sup>

Ecuador cites *Georgia v. Russia* in support of its claim that mere silence can put two States in positive opposition. That case, however, does not support Ecuador's claim. There, Georgia claimed that Russia had violated a human rights treaty through acts of "ethnic cleansing." Russia *expressly*, and publicly, denied those claims.<sup>102</sup> The ICJ thus determined that the two parties were, in fact, in positive opposition.<sup>103</sup> Here, by contrast, neither Ecuador nor the United States has alleged any breach of the Treaty by the other Party, and, as Ecuador admits, the United States has neither publicly nor privately affirmed or denied Ecuador's interpretation of Article II(7).

Ecuador's reliance on *UN Headquarters* and *Cameroon v. Nigeria* is similarly misplaced. In both cases, one party alleged that the other had breached international law obligations owed to that party. In both cases, the ICJ held that even in the absence of an express statement by the accused parties refuting the claim, the significant *actions* of the accused parties, allegedly contrary to their treaty obligations, provided clear evidence that they opposed the claim of

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<sup>101</sup> *Id.* at p. 18 (confirming that Ecuador "has not accused the United States of any wrongdoing" and "does not accuse the United States of violating any of its international obligations") (statement of Ecuador's counsel).

<sup>102</sup> *Case Concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*, Judgment on Preliminary Objections ¶ 112 (Apr. 1, 2011) [R-9]. The ICJ majority pointed to two public exchanges of views that have no analogue here: a heated colloquy between the two countries' Permanent Representatives at the U.N. Security Council and a press conference and subsequent interview on CNN by President Saakashvili that elicited a strong rebuttal from the Russian Foreign Ministry.

<sup>103</sup> *Id.* ¶ 113 ("[T]he claims made by the Georgian President on 9 and 11 August and the response on 12 August by the Russian Foreign Minister establish that by that day . . . there was a dispute between Georgia and the Russian Federation about the latter's compliance with its obligations under CERD as invoked by Georgia in this case.") [R-9].

breach, thus giving rise to a dispute. Here, again, Ecuador does not allege that the United States took any actions contrary to its obligations under the Treaty.

In *UN Headquarters*, the UN Secretary-General claimed that legislation requiring closure of the Palestine Liberation Organization's Observer Mission to the United Nations violated the UN Headquarters Agreement.<sup>104</sup> Although the United States did not state expressly that enforcement of the legislation would not violate the Agreement,<sup>105</sup> the passage of the law and other substantial activities taken by the United States with the aim of closing the Observer Mission manifested its position:<sup>106</sup>

[W]here one party to a treaty protests against the behavior or a decision of another party, and claims that such *behavior or decision* constitutes a breach of the treaty, the mere fact that the party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the interpretation or application of the treaty.<sup>107</sup>

Thus, in a situation in which a claimant is protesting against the actions of the respondent, *and* alleging that the actions of the respondent violate an obligation under the Treaty, *and* the respondent party offers no justification for its actions, a tribunal may be able objectively to determine the existence of positive opposition, *provided* there is clear evidence that the respondent's actions manifested its opposition. But none of these factors is present in this case.

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<sup>104</sup> See, e.g., *Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, 1988 I.C.J., 12, 28 (Advisory Opinion of Apr. 26) [R-57].

<sup>105</sup> *Id.* at 29 [R-57].

<sup>106</sup> Multiple actions by the United States showed that it had taken an "opposing attitude" to the position of the UN: the Act was specifically designed to close the PLO Observer Mission, the law was to enter into effect automatically, and the U.S. Attorney General had announced that the law obligated him to close the PLO Observer Mission. An objective determination of the facts, therefore, showed that the Parties were in positive opposition. *Id.* at pp. 29-30 [R-57].

<sup>107</sup> *Id.* at p. 28 (emphasis added) [R-57].

*Cameroon v. Nigeria* also has no application to this case, as Nigeria's *actions and statements* evidenced its clear opposition to Cameroon's allegations of breaches of customary international law. Nigeria admitted that it disagreed with Cameroon's claim to certain territory on the Cameroon-Nigeria border; it simply denied that there was a dispute concerning the remainder of the border. Despite this denial, Nigerian troops had engaged in "incidents and incursions" in the territory beyond that which Nigeria admitted was disputed.<sup>108</sup> Once again, Nigeria's *actions*, together with other factors, led the Tribunal to objectively determine that Nigeria disagreed with Cameroon over the delineation of the boundary.<sup>109</sup>

In both *UN Headquarters* and *Cameroon v. Nigeria*, the ICJ found positive opposition because the parties' positions were manifest, even if not expressly stated – they related to allegations of violation by one party, and there was clear conflict between those positions. Here, by contrast, the United States has not taken any actions that could indicate a position on the interpretation of Article II(7), and has not been accused of Treaty violations. Indeed, Ecuador conceded that it accuses the United States of no wrongdoing and that it does not know if the United States agrees or disagrees with its interpretation of Article II(7).<sup>110</sup> This Tribunal, therefore, cannot make an objective determination that the United States, through statements or actions, positively opposed Ecuador's interpretation of the meaning of Article II(7) when Ecuador itself continues to profess total ignorance of the U.S. view.

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<sup>108</sup> *Land and Maritime Boundary Case (Cameroon v. Nigeria)*, 1998 I.C.J. 275, ¶ 90 (Judgment on Preliminary Objections of June 11) [R-8].

<sup>109</sup> *Id.* ¶ 93 [R-8].

<sup>110</sup> Transcript of Preparatory Meeting, Mar. 21, 2012, at pp. 10-12, 18 (statement of Ecuador's counsel).

## ii. Ecuador Cannot Create Positive Opposition Where None Exists

Ecuador cannot unilaterally create “positive opposition” in order to manufacture jurisdiction before this Tribunal. Positive opposition requires an *objective determination* by this Tribunal that one Party’s claims of a Treaty breach are refuted by the other Party.<sup>111</sup> It is the stated positions and actions of the parties related to an alleged breach of international law – not a unilateral ultimatum – that can place the parties in positive opposition.

Ecuador claims that the State Department Legal Adviser stated that the United States “will not rule” on Ecuador’s request that it agree to Ecuador’s interpretation of Article II(7). Even if that were true,<sup>112</sup> however, it would not create positive opposition over the interpretation of Article II(7). In fact, Ecuador concedes that “the U.S. never informed Ecuador that it agreed with Ecuador’s interpretation of Article II(7) or, for that matter, that it disagreed with Ecuador’s interpretation.”<sup>113</sup> Ecuador cannot show that the United States contradicted a claim of treaty violation by Ecuador in diplomatic or public statements, and thus no objective assessment of this statement could lead to the conclusion that the Parties were in positive opposition.

The International Court of Justice has concluded similarly. In *Certain Property*, for instance, the ICJ found that diplomatic exchanges demonstrating a clear difference of views manifested positive opposition over whether there was a breach of an international obligation.<sup>114</sup> There, Liechtenstein claimed that Germany had violated a post-World War II settlement

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<sup>111</sup> *Interpretation of Peace Treaties* (First Phase), 1950 I.C.J. at p. 74 [R-6]; *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, 1962 I.C.J. at p. 328 [R-5].

<sup>112</sup> Request for Arbitration ¶ 13. As observed in note 9, *supra*, the United States disagrees with Ecuador’s factual representation on this point, as on others, and reserves the right to present any necessary rebuttal evidence. But even accepting Ecuador’s representations as true for purposes of this Memorial, there still would be no “dispute” for purposes of Article VII and, hence, manifestly no jurisdiction in this case.

<sup>113</sup> Transcript of Preparatory Meeting, Mar. 21, 2012, at p. 10 (statement of Ecuador’s counsel).

<sup>114</sup> *Certain Property (Liechtenstein v. Germany)*, 2005 I.C.J. at ¶ 25 [R-7].

agreement through the German courts' refusal to admit Liechtenstein's claim over the ownership of a painting. As evidence of Germany's opposition to its claims, Liechtenstein cited statements Germany made in consultations with Liechtenstein and a letter from the German Foreign Minister to the Foreign Minister of Liechtenstein stating that it was "known that the German Government [did] not share the legal opinion" of Liechtenstein on this matter.<sup>115</sup> The ICJ found that Germany's statements contradicted Liechtenstein's views over the legality of the German courts' actions, thereby putting the States in positive opposition over this alleged breach.<sup>116</sup>

Here, by contrast, even by Ecuador's account, the Legal Adviser reportedly stated that the United States would not "rule" on Ecuador's request – not that it disagreed with Ecuador's interpretation of Article II(7).<sup>117</sup> The United States, therefore, has not refuted any alleged violation of an obligation under international law, unlike the situation in all cases cited by Ecuador. Ecuador thus cannot demonstrate that the Legal Adviser's statement evidenced positive opposition between the Parties.

Nor can Ecuador force the Parties into positive opposition by simple assertion. As the ICJ has stated, "it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party[.] It must be shown that the claim of one party is positively opposed

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<sup>115</sup> *Id.* ¶ 23 [R-7].

<sup>116</sup> *Id.* ¶ 25 [R-7]. See also *Interpretation of Peace Treaties*, First Phase, 1950 I.C.J. at p. 67 (concluding that directly opposing views contained in diplomatic correspondence permitted an objective determination that the put had themselves in positive opposition over the alleged breach of the Treaties); *East Timor (Portugal v. Australia)* 1995 I.C.J. at ¶ 17-22 (concluding that, "By virtue of its denial" of Portugal's "complaints of fact and law" concerning allegations that Australia had recognized Indonesian sovereignty over East Timor, Australia had put itself in positive opposition with Portugal over this alleged breach); *Georgia v. Russia*, Judgment on Preliminary Objections (Apr. 1, 2011) (finding positive opposition from the conflicting statements that the parties made to the UN Security Council and to news media about the alleged violation of the CERD) [R-9].

<sup>117</sup> Transcript of Preparatory Meeting, Mar. 21, 2012, at p. 11 (statement of Ecuador's counsel).

by the other.”<sup>118</sup> Ecuador therefore cannot, by stating its own interpretation of a provision of the Treaty, unilaterally place the United States in the untenable position of having no choice but to agree with Ecuador or be deemed to be in positive opposition. Ecuador therefore cannot issue its unilateral interpretation and then argue that the sole means for the United States to avoid arbitration is by agreeing with the interpretation, because either rejecting the interpretation or remaining silent would indicate positive opposition.<sup>119</sup>

**B. The United States Does Not Owe Ecuador an Obligation to Respond to, Let Alone Confirm, Ecuador’s Unilateral Interpretation of the Treaty**

Because there is no “dispute between the Parties concerning the interpretation or application of the Treaty,” Ecuador seeks to manufacture a dispute by citing to general principles of international law. In particular, Ecuador alleges that the principle of “good faith” – the key international legal principle underlying *pacta sunt servanda* – obligated the United States to confirm Ecuador’s unilateral interpretation of Article II(7). Ecuador’s theory is fundamentally flawed for two reasons.

*First*, Ecuador has no right under the Treaty or general international law to demand that the United States confirm its own interpretation of Article II(7) or submit to arbitration. The United States exercised its discretion not to respond to Ecuador’s demand for an interpretation. For Ecuador to be able to unilaterally create a dispute about the substance of its demand would turn international treaty practice on its head.

*Second*, Ecuador points to no provision of the Treaty that either expressly or through the application of general international legal principles would require the United States to respond to

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<sup>118</sup> *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, 1962 I.C.J. at p. 328 [R-5].

<sup>119</sup> See Transcript of Preparatory Meeting, Mar. 21, 2012, at p. 12 (statement of Ecuador’s counsel).

Ecuador's demand for confirmation of its interpretation of Article II(7). States retain the discretion to agree mutually to a joint interpretation, or "subsequent agreement," if they wish, which can further clarify the Parties' understanding of a particular provision.<sup>120</sup> Likewise, they retain the discretion not to elaborate on the meaning of a specific treaty provision.<sup>121</sup> But no legal principle supports Ecuador's argument that States are obliged to reach such an agreement.

### **1. Ecuador Cannot Unilaterally Require the United States to Respond to its Demand for Confirmation of its Interpretation**

Ecuador cannot, by fiat, impose an obligation on the United States to respond to its request.<sup>122</sup> Although a State may bind itself under international law by a unilateral act, it may not bind another by that act.<sup>123</sup> Were it otherwise, one party could force another to create treaty mechanisms and obligations to which it did not consent. If accepted here, Professor Tomuschat cautions, Ecuador could "bring into being a specific mechanism not provided for by the treaty itself" and instead allow Ecuador, "at any time, whenever considered necessary and appropriate by it, [to] call upon the United States to pronounce itself on the proper interpretation of any provision of the BIT."<sup>124</sup>

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<sup>120</sup> Vienna Convention on the Law of Treaties, Article 31(3)(a) (identifying "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" as an authoritative source for construing the meaning of a treaty) [R-15].

<sup>121</sup> Tomuschat Opinion ¶ 15. As the *Methanex* NAFTA Chapter Eleven tribunal stated, "an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation." *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Final Award (Aug. 3, 2005), Pt. II, Ch. B, ¶ 19 (quoting International Law Commission Report, vol. 2, at 221, and noting the ICJ's approval of this passage in the *Kasikili/Sedudu Island Case (Botswana v. Namibia)*, 1999 I.C.J. 1, ¶ 49) [R-58].

<sup>122</sup> See, e.g., Request for Arbitration ¶ 14; Patiño Letter, at pp. 3-4 [R-2].

<sup>123</sup> See *Nuclear Tests (Australia v. France)*, Judgment, 1974 I.C.J. REP. 253 (Dec. 20) [R-59]; *Nuclear Tests (France v. New Zealand)*, 1974 I.C.J. 457 (Judgment of Dec. 20) [R-60].

<sup>124</sup> Tomuschat Opinion ¶ 22.



This unbounded power that Ecuador asserts is inconsistent with any notion of mutuality upon which a State's entering into a treaty presumes. Professor Tomuschat observes:

[Ecuador] does not even contend that its alleged power to require such an authoritative interpretation is limited by any objective criteria. It simply wishes to be able to proceed with its wishes for clarification at its own volition, irrespective of any act of the United States that would have taken a position to the contrary. Under its logic, it would be able to draw the United States into an arbitral proceeding according to its own political determinations, without any regard for the actual practice shown or supported by the United States.<sup>125</sup>

Ecuador's action is not authorized by any provision of the Treaty, any applicable general principle of law, or any established practice of states. It is unprecedented and cannot be the grounds on which this Tribunal can find jurisdiction under Article VII.

## **2. Nothing in the Treaty Obligates the United States to Respond to Ecuador's Demand for Confirmation of its Interpretation**

The text of the BIT, which is the Parties' authentic expression of their mutual intent and understanding, contains no provision obligating the United States to interpret the Treaty beyond the four corners of the text itself. As Professor Tomuschat notes, "[t]he BIT does not provide for such an obligation," and no such obligation can be read into the Treaty.<sup>126</sup>

The only provision in the Treaty under which the United States has committed to engage regarding the meaning of its provisions is Article V, on consultations. Article V states that the United States and Ecuador "agree to consult promptly . . . to discuss any matter relating to the

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.* ¶ 13 ("Ecuador assumes that the United States was placed under a legal obligation to provide an answer" to its unilateral demand, but "Ecuador fails to show that such an obligation was incumbent on the United States to express itself as to the substantive difficulty of the interpretation of Article II(7) of the BIT."). *See also* ROBERT JENNINGS & ARTHUR WATTS, 1 OPPENHEIM'S INTERNATIONAL LAW § 599 (9th ed. 1992) ("A treaty being a contract, mutual consent of the parties is necessary.") [R-83].

interpretation or application of the Treaty.”<sup>127</sup> As Professor Tomuschat has opined, this would have been the proper avenue to see if the Parties could agree to a mutually acceptable interpretive statement.<sup>128</sup>

Even had the United States “promptly” agreed to “consult” and “discuss” any “matter relating to the interpretation or application of the Treaty,” upon a request from Ecuador, nothing in Article V would have obligated the United States to respond to Ecuador’s demand to confirm its interpretive statement. As *Oppenheim’s* observes, “[w]hile consultations must be undertaken in good faith, they do not give to any of the states involved a right to have its views accepted by the others or to stop them acting in whatever way they propose.”<sup>129</sup>

#### **i. “Good Faith” Cannot Expand a Party’s Obligations Under a Treaty**

Ecuador argues that principles of good faith and *pacta sunt servanda* obligate the United States to respond to its demand for an interpretation.<sup>130</sup> But this argument fails for two reasons. *First*, it is well established in international law that “[t]he principle of good faith is . . . one of the basic principles governing the creation and performance of legal obligations,” but “*it is not in itself a source of obligation where none would otherwise exist.*”<sup>131</sup> In other words, any obligation to respond must be found in the Treaty. Absent a specific treaty obligation, a State

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<sup>127</sup> Article V.

<sup>128</sup> Tomuschat Opinion ¶ 14. Consultations is also the mechanism that the Netherlands and the Czech Republic pursued when issuing “agreed minutes” on the operation of certain provisions of their BIT. *See CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award ¶ 87 (Mar. 14, 2003) [R-61].

<sup>129</sup> OPPENHEIM’S INTERNATIONAL LAW at § 573 (recognizing that States in negotiations, even when they are obligated to negotiate, “are under no legal obligation to reach agreement.”) [R-83].

<sup>130</sup> *See* Request for Arbitration ¶ 11. The principle of good faith is found in Article 26 of the Vienna Convention on the Law of Treaties, which is entitled “*Pacta Sunt Servanda.*” It states: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” [R-15].

<sup>131</sup> *Border and Transborder Armed Actions Case (Nicaragua v. Honduras)*, 1988 I.C.J. 69, 105 (Judgment on Jurisdiction and Admissibility of Dec. 20) (emphasis added) [R-62]. *See also* Tomuschat Opinion ¶ 15 (stating that ancillary duties cannot “be derived from the principle of *bona fides.*”).

“may not justifiably rely upon the principle of good faith” to support a claim.<sup>132</sup> Here, the Treaty contains no obligation that the United States has failed to carry out in good faith. Ecuador cannot rely on the principle of good faith to create an international obligation where none exists.

The principle of “good faith,” moreover, applies to *both* parties to an agreement; it cannot be construed to require one State to agree or disagree with any position proffered by the other. Ecuador, moreover, has an obligation to comport itself in accordance with the principle of good faith. It is hard to find evidence of such good faith, however, in Ecuador’s decision to invoke Article VII for purposes of this arbitration just months after having successfully petitioned its own court to declare that provision unconstitutional.<sup>133</sup> Once again, Ecuador cannot have it both ways; if it did not intend to be bound by Article VII, or if it genuinely believed that that provision violated its own domestic constitutional law, it should not have sought to convene this Tribunal.

*Second*, Ecuador cannot rely on *pacta sunt servanda* to forge an obligation requiring the United States to interpret the Treaty to prevent “any misinterpretation and misapplication” of the BIT “that results in harm” to Ecuador.<sup>134</sup> It is of course true that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>135</sup> But again,

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<sup>132</sup> *Land and Maritime Boundary Case (Cameroon v. Nigeria)*, 1998 I.C.J. at ¶ 39 [R-8].

<sup>133</sup> See Decision No. 043-10-DTC-CC, Case No. 0013-10-71, Decision of Constitutional Court, at p. 12 (Nov. 25, 2010) [R-14]. But see Vienna Convention, art. 27 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”) [R-15].

<sup>134</sup> Request for Arbitration ¶ 11.

<sup>135</sup> Vienna Convention, art. 26 [R-15]. See also Report of the International Law Commission Covering Its 16<sup>th</sup> Session, 727th Meeting (May 20, 1964) 1 Y.B. INT’L L. COMM’N 32, ¶ 70 (1964), U.N. Doc. A/CN.4/SER.A/1964 (“[A] treaty must be applied and observed not merely according to its letter, but in good faith” including “abstain[ing] from acts which would inevitably affect [the Parties’] ability to perform the treaty.”) [R-18]. A rule of treaty interpretation, *pacta sunt servanda*, cannot be transformed into an open-ended source for claimants to import other international obligations. In support of its argument, Ecuador cannot rely on the Separate Opinion of Judge Cançado Trindade in *Hilaire, Constantine, and Benjamin v. Trinidad and Tobago*, Series C No. 94 [2002] IACHR 4

Ecuador can point to no obligation that the United States has failed to perform or acted in bad faith. Nor can Ecuador allege that the lack of a response by the United States somehow prevents Ecuador from performing under the BIT.<sup>136</sup>

## **ii. General International Law Does Not Require a State to Respond to an Interpretative Declaration**

Aside from *pacta sunt servanda*, Ecuador has not proffered any international law principle that supports its assertion that the United States must confirm its unilateral statement of interpretation.<sup>137</sup> The reason is simple: there is no such rule. Ecuador cannot make up for the absence of any obligation here on the United States by framing its demand as a request for an interpretation. In essence what Ecuador has presented in its diplomatic note is akin to a unilateral interpretative declaration, coupled with a demand that another State accept it. But as Professor McRae has observed, “[t]here is no duty to respond to [such a unilateral] declaration nor is the declaration a threat to or infringement of rights” of the other State.<sup>138</sup> Unilateral

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(June 21, 2002). That Separate Opinion addressed the rule of *pacta sunt servanda* in the context of Trinidad and Tobago’s fulfillment of “the international obligations that it has assumed.” *See id.* ¶ 43.

<sup>136</sup> *See* Transcript of Preparatory Meeting, Mar. 21, 2012, at p. 16 (statement of Ecuador’s counsel) (posing series of hypothetical questions about Ecuador’s performance under Article II(7) of the BIT).

<sup>137</sup> *See Continental Shelf Case (Libya v. Malta)*, 1985 I.C.J. 13, 29 (Judgment of June 3) (“It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States . . . .”) [R-63]; *Military and Paramilitary Activities in and Against Nicaragua Case (Nicaragua v. United States)*, 1986 I.C.J. 14, 108-09 (Judgment of June 27, 1986) (“[F]or a new customary rule to be formed, not only must the acts concerned ‘amount to a settled practice,’ but they must be accompanied by the *opinio juris sive necessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is ‘evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.’”) [R-64]; *see also* CLIVE PARRY ET AL., *ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW* 81-82 (1986) (customary international legal rule emerges from “a concordant practice of a number of States acquiesced in by others; and a conception that the practice is required by or consistent with the prevailing law (the *opinio juris*)”) [R-111]. The relevant state practice “should have been both extensive and virtually uniform in the sense of the provision invoked; – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.” *North Sea Continental Shelf Cases* (Germany v. Denmark; Germany v. Netherlands), 1969 I.C.J. 3, 43 (Judgment of Feb. 20) [R-66].

<sup>138</sup> D.M. McRae, *The Legal Effect of Interpretative Declarations*, 49 BRIT. Y.B. INT’L L. 155, 169 (1978) (examining the legal effect of a unilateral interpretative declaration by one State in the context of the reaction of the other State and concluding that they can indicate how a State construes its obligations) (internal quotations and citation omitted) [R-84].

interpretative statements generally are “subjective; they express the views of the declaring State . . . but do not deal with the legal effect of the treaty.”<sup>139</sup> Nor are they regulated by international law.<sup>140</sup> Accordingly, international law generally neither compels a State to respond to a demand to agree to one State’s unilateral interpretation nor prohibits a State from remaining silent when confronted with such a demand.<sup>141</sup>

The only “rule” that applies to a State’s unilateral interpretation is that, if and when the other Party to a treaty may express its agreement with the interpretation, it becomes part of the

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<sup>139</sup> Bruno Simma, *The Work of the International Law Commission at Its Fifty-First Session*, 68 NORDIC J. INT’L L., 293, 319 (1999) (noting that “good practice would suggest that interpretative declarations only be made at certain times, preferably as specified by treaty.”) (emphasis added) [R-85].

<sup>140</sup> REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SIXTY-THIRD SESSION, Chapter VI, Reservations to Treaties, *Text of the Guide to Practice on the Reservation of Treaties, with Commentaries*, 115, Guideline 1.6.2, commentary 1, reprinted in Y.B. INT’L L. COMM’N 2011 (“*ILC Guide to Practice on Reservations to Treaties*”) (“The silence of the [ ] Vienna Conventions [on the Law of Treaties] extends a fortiori to interpretative declarations made in respect of bilateral treaties: the Conventions do not mention interpretative declarations in general and are quite cautious insofar as the rules applicable to bilateral treaties are concerned.”) [R-19]. The ICJ has concluded that the lack of a prohibition against particular State conduct generally implies that such conduct is in accord with general international law. See, e.g., *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion of July 22, 2010) ¶¶ 79-84 (holding that Kosovo’s declaration of independence was “in accordance with international law” because “general international law contains no applicable prohibition of declarations of independence”) [R-65]; *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 247 (Advisory Opinion of July 8) (“State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition.”) [R-20].

<sup>141</sup> See, e.g., *ILC Guide to Practice on Reservations to Treaties*, Guideline 1.6.2, commentary 6, 116 (An interpretative declaration “may also be simply intended to inform the partner of the meaning and scope which the author attributes to the provisions of the treaty without, however, seeking to impose that interpretation on the partner, and in this case it is a ‘simple interpretative declaration,’ which . . . can actually be made at any time”). See also Guidelines 2.9.8.1 at 325 (“An approval of an interpretative declaration shall not be inferred from the mere silence of a State or an international organization.”); Guideline 2.9.2., commentary (2) at 328 (noting that “[s]ilence can express either agreement or disagreement with the proposed interpretation. States may consider it unnecessary to respond to an interpretative declaration because they share the view expressed therein, or they may feel that the interpretation is erroneous but that there is no point in saying so since, in any event, the interpretation would not, in their view, be upheld by an impartial third party in case of a dispute. It is impossible to determine which of these two hypotheses is correct.”) [R-23]. See also McRae, *The Legal Effect of Interpretative Declarations*, 49 BRIT. Y.B. INT’L L. at 159 (“State practice on the point is varied. Examples can be found of interpretative declarations that have evoked no comment from the other parties to the treaty. Examples can also be found of interpretative declarations that have been objected to by the contracting parties.”) [R-84].

context in which the terms of the treaty are to be read.<sup>142</sup> But if the Parties do not agree, the interpretative statement remains just that – one Party’s unilateral view of the treaty provision in question.<sup>143</sup> Both Parties to a treaty must agree for a joint interpretation to be authoritative; the power to agree is not one Party’s alone. We are aware of no instance of a party imposing its unilateral interpretative view on another party through arbitration.<sup>144</sup> In the one instance where a party to a treaty sought to do so, the tribunal firmly rejected the argument.<sup>145</sup>

### **iii. Treaty Practice Under BITs Does Not Support Ecuador’s Unprecedented Actions in this Case**

Ecuador’s effort to compel the United States, as a treaty partner, to issue an interpretation is unprecedented in the operation of investment treaties over at least the past 50 years. Here, the Tribunal should be guided by State practice and the common habitual pattern adopted under previous treaties. There is no example we know of where a State Party has responded to another Party’s demand for an interpretation because it believed it was under an obligation to do so. Nor have we found a treaty that creates such an obligation.

Where the United States and its treaty partners have made express provision for States to offer their unilateral views on the meaning of a provision of an investment treaty, they have created a discretionary rather than a mandatory right. For example, in the context of NAFTA Chapter Eleven, which sets forth each Party’s obligations toward the others’ investors, “a Party

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<sup>142</sup> See *ILC Guide to Practice on the Reservation of Treaties*, Guideline 1.6.3, at 117 (“The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State . . . to the treaty and accepted by the other party constitutes an authentic interpretation of that treaty.”) [R-19].

<sup>143</sup> Unilateral interpretative declarations must be contrasted with a reservation, made at the time a treaty is concluded, and to which the other party or parties must object or be bound, and an amendment, which in changing the meaning of the treaty, requires both or all parties to a treaty to agree. *Id.*

<sup>144</sup> See *ILC Guide to Practice on Reservations to Treaties*, Guideline 1.6.1, commentary (3), at 109 (noting that, even in the context of a reservation to a treaty, “[i]f they [the Parties] arrive at an agreement – either adopting or rejecting the reservation – the treaty will be concluded; if not, it will fall to the ground.”) [R-19].

<sup>145</sup> *Cases of Dual Nationality*, XIV UN REPS. INT’L ARB. AWARDS, at p. 27 [R-30].

may make submissions to a Tribunal on a question of interpretation of this Agreement.”<sup>146</sup> The United States’ more recent BITs and FTA investment chapters include similar provisions.<sup>147</sup> Often the NAFTA Parties have not expressed views, either jointly or individually, even when invited by an investment tribunal to do so.<sup>148</sup> Aside from U.S. practice, in the conduct of investor-State arbitration, unilateral expressions of the meaning of a treaty by non-disputing States Parties are exceedingly rare.<sup>149</sup>

In the same way, where State practice exists, it confirms that States have the discretion, not the obligation, to agree to interpret a treaty jointly.<sup>150</sup> These voluntary joint interpretations – “subsequent agreements,” as understood by Article 31(3)(a) of the Vienna Convention – can then become part of the context in which the text of a treaty provision must be construed.

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<sup>146</sup> North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., art. 1128 (emphasis added) [R-24].

<sup>147</sup> The same provision – retaining the same discretion – appears in all of the FTA investment chapters entered into after NAFTA. See, e.g., CAFTA, Art. 10.20.2 (“A non-disputing Party may make oral and written submission to the tribunal regarding the interpretation of this Agreement.”) [R-26].

<sup>148</sup> See Letter from United States to Tribunal in *Mobil Investments Canada, Inc. v. Canada*, ICSID Case No. ARB(AF)/07/4 dated Aug. 1, 2011 (declining invitation to submit non-disputing Party submission to the tribunal) [R-67].

<sup>149</sup> See, e.g., *Aguas del Tunari v. Bolivia*, ICSID No. ARB/02/3, ¶¶ 268-74 (2005) (seeking clarification of statements made by The Netherlands in response to parliamentary questions about its bilateral investment treaty with Bolivia) [R-68]. One other instance involves Switzerland’s complaint to the ICSID Secretariat for failing to request its views during an investor-State arbitration on the scope of the umbrella clause in Switzerland’s bilateral investment treaty with Pakistan. See Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT’L L. at p. 179 (2010) [R-86].

<sup>150</sup> See, e.g., *CME Czech Republic B.V. v. Czech Republic*; Final Award, ¶¶ 87-93, 198, 216-26, 437, 504 (joint interpretation through “Agreed Minutes” issued through consultations as provided for in Netherlands-Czech BIT) [R-61]; *Nat’l Grid PLC v. Argentina* (UNCITRAL), Award on Jurisdiction (June 20, 2006) ¶ 85 (noting that, “after the decision on jurisdiction in *Siemens* [A.G. v. Argentina, ICSID No. ARB/02/8, Jurisdiction (Aug. 3, 2004) 44 ILM 138 (2005)], the Argentine-Republic and Panama exchanged diplomatic notes with an ‘interpretative declaration’ of the [most-favored nation] clause in their 1996 investment treaty to the effect that, the MFN clause does not extend to dispute resolution clauses, and that this has always been their intention”) [R-70].

But such agreed interpretations have been strictly voluntary and are rare in international practice under investment treaties.<sup>151</sup> The Netherlands, for example, consented to offer its views of the meaning of a treaty provision in the context of a request by the Czech Republic under the consultations provision in the Czech-Netherlands BIT.<sup>152</sup> Similarly, Argentina and Panama issued an exchange of notes to reach a “joint” interpretative declaration on the meaning of the MFN clause in their BIT.<sup>153</sup> In neither case, however, did a State Party offer an interpretation on the basis that the other Party had compelled it to do so. Finding such an obligation where none exists would contravene the principle that when States seek to restrict their discretion, they do so expressly.<sup>154</sup> Such an “important principle of international law should not be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so.”<sup>155</sup> This Tribunal should refrain from reading into the BIT new and unprecedented obligations which it simply does not contain.

Professor Tomuschat summarizes the absence of any obligation stemming from the BIT that would require the United States to respond to Ecuador’s ultimatum:

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<sup>151</sup> Reisman Opinion ¶¶ 45-46 (describing limited cases involving State interpretive efforts outside the NAFTA context).

<sup>152</sup> See *CME Czech Republic B.V. v. Czech Republic*, Final Award, ¶¶ 87-93 (UNCITRAL Mar. 14, 2003) (addressing Czech Republic’s request to The Netherlands under Article 9 of The Netherlands-Czech Republic BIT to reach agreement on three matters: the applicable law to be applied by a tribunal, the application of the treaty to predecessor claims, and treatment of claims brought by an indirect investor under a different treaty) [R-61].

<sup>153</sup> See *Nat’l Grid PLC v. Argentina* (UNCITRAL) Award on Jurisdiction (June 20, 2006) ¶ 85 [R-70].

<sup>154</sup> See, e.g., Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, ¶ 165 (Jan. 16, 1998) (recognizing that an international tribunal cannot “lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation” . . . “[t]o sustain such an assumption and to warrant such a far-reaching interpretation, treaty language far more specific and compelling . . . would be necessary”) [R-21]. See also PCIJ, *Polish War Vessels in Danzig* (1931), Adv. Op., A/B/43, p. 144 (“[T]he intention of the parties must be sought out and enforced even though this should lead to an interpretation running counter to literal terms of an isolated phrase, which read in connection with its context susceptible of a different construction.”) [R-69].

<sup>155</sup> *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award (June 19, 2003) ¶¶ 160-162 (citing *Elettronica Sicula SpA (ELSI) (United States v Italy)*, 1989 I.C.J. 15, ¶ 162) (“It would be strange indeed if sub silentio the international rule were to be swept away.”) [R-71].



The sole fact that Ecuador and the United States are the two parties of the BIT does not obligate either of them or both of them jointly to intervene in an authoritative manner each time that some problem arises in the interpretation and application of the BIT . . . . [Such action] derive[s] from a mechanism that is not provided for under the BIT. Accordingly, viewed from the perspective of the BIT's logic, the United States Government was not required to accept or rebut Ecuador's interpretation of Article II(7) of the BIT.<sup>156</sup>

In those instances where investment treaties expressly contemplate the issuance of “authoritative” interpretations to clarify the meaning of a treaty, they expressly require the Parties’ mutual agreement. The NAFTA Parties, for instance, have given the tripartite Free Trade Commission the authority to issue authoritative, *binding* interpretations of Chapter Eleven, leaving it to the Parties themselves to resolve questions of the meaning of the treaty’s obligations if they choose to do so and can agree.<sup>157</sup> Article 1131 of the NAFTA, which also is reflected in the U.S. Model BIT<sup>158</sup> and in recent U.S. free trade agreements,<sup>159</sup> was an innovation when first introduced. Such provisions remain the exception rather than the rule in international practice.<sup>160</sup>

In contrasting Article VII of the BIT to NAFTA Article 1131, Professor Reisman illustrates how parties to an agreement can express their intent clearly:

The notion that Article VII of the BIT is equivalent to Article 1131 of NAFTA encounters . . . difficulties. Article 2001 [of the NAFTA] requires the States-parties creating the Free Trade Commission to compose it with ministers who resolve interpretive disputes. The NAFTA arrangement provides for negotiation

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<sup>156</sup> Tomuschat Opinion ¶ 17.

<sup>157</sup> NAFTA, art. 1131 (“An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section [B].”). To date, the NAFTA parties have used their express authority to issue a binding interpretation only once, in 2001 [R-24].

<sup>158</sup> 2012 U.S. Model BIT, art. 30(3) (“A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.”) [R-22].

<sup>159</sup> See, e.g., Dominican Republic – Central America Free Trade Agreement, Aug. 5, 2004, art. 10.22(3) (“A decision of the Commission declaring its interpretation of a provision of this Agreement under Article 19.1.3(c) (The Free Trade Commission) shall be binding on a tribunal established under this Section, and any decision or award issued by the tribunal must be consistent with that decision.” [R-26].

<sup>160</sup> See Roberts, *Power and Persuasion in Investment Treaty Interpretation*, at 179 [R-86].

between the parties to the treaty. These interpretations then become, *by operation of the treaty*, authoritative for tribunals called upon to arbitrate investment disputes arising under the treaty.<sup>161</sup>

But no such intent appears in Article VII. And in any event, even NAFTA Article 1131 does not compel joint interpretations.

In sum, the BIT imposes no obligation on the United States to respond, let alone agree, to Ecuador's demand to interpret the Treaty. The Tribunal should reject Ecuador's attempt to conjure such an obligation in order to establish jurisdiction over its unfounded claim.

### **C. Article VII Does not Create Advisory, Appellate, or Referral Jurisdiction**

Ecuador's attempt to force this Tribunal to decide Ecuador's request, absent a genuine dispute between the Parties, raises jurisprudential issues that extend far beyond this case. States may consent by express agreement to refer any legal question to a third party for resolution and need not reserve to themselves the discretion to agree to the meaning of a treaty provision (although the latter is the rule rather than the exception). Nothing in Article VII grants the Tribunal the power to decide a legal issue or question outside the context of an actual controversy between the Parties.<sup>162</sup> Had the United States and Ecuador intended to afford the

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<sup>161</sup> Reisman Opinion ¶ 44 (emphasis in original). Ecuador's effort to interpret Article VII to have the same meaning as NAFTA Article 1131(a) should be rejected. Ecuador itself recognizes that an arbitral tribunal cannot interpret the BIT and the NAFTA the same, given the different terms in the two agreements and the different parties that concluded them. *See* Plaintiff's Writ of Summons, *Ecuador v. Chevron*, District Court of The Hague, Cause-List No. 2011/402 ¶ 32(iii) ("[T]he Arbitral Tribunal wrongfully adopts the point of view that the wording of the North American Free Trade Agreement ('NAFTA'), another treaty entered into by different parties, is similar to the BIT's wording and, consequently, the BIT should be interpreted in a manner equal to the interpretation given to relevant parties of the NAFTA.") [R-31].

<sup>162</sup> The meaning of a treaty provision *in abstracto* is a legal question, and unless parties to a treaty decide otherwise, the authoritative meaning of any treaty provision is reserved to their mutual agreement. A leading French commentary observes: "The expression 'authentic interpretation' designates that which is furnished directly by the parties, as opposed to an unauthentic interpretation, which is given by a third party." NGUYEN QUOC DINH, PATRICK DAILLIER & ALAIN PELLET, *DROIT INTERNATIONAL PUBLIC* 251 (7th ed. 2002) ("On désigne par l'expression 'interprétation authentique', celle qui est fournie directement par les parties, par opposition à l'interprétation non authentique, donnée par un tiers.") (translation by counsel) [R-87]; *see also* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 532 (O. Dörr & K. Schmalenbach eds., 2012) ("Even if a

Tribunal broader powers to address abstract legal questions, like the one presented by Ecuador, they would have had to state so expressly in the Treaty.<sup>163</sup> As Professor Tomuschat observes:

[Ecuador] wishes to bring into being a specific mechanism not provided for by the treaty itself. It takes the view that it may at any time, whenever considered necessary and appropriate by it, call upon the United States to pronounce itself on the proper interpretation of any provision of the BIT. It does not even contend that its alleged power to require such an authoritative interpretation is limited by any objective criteria. It simply wishes to be able to proceed with its wishes for clarification at its own volition, irrespective of any act of the United States that would have taken a position to the contrary. Under its logic, it would be able to draw the United States into an arbitral proceeding according to its own political determinations, without any regard for the actual practice shown or supported by the United States.<sup>164</sup>

Ecuador cannot demonstrate that the Parties intended to provide for such a mechanism, and this Tribunal cannot accept as decisive the will of only one Party.

Absent the expressed consent of both Parties, the Tribunal has no authority to act as an advisory, appellate or referral body.<sup>165</sup> “[T]he role of the treaty interpreter is not to look for the

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separate treaty organ is set up with the power to interpret the treaty, it is merely the parties to a treaty which can give an *authoritative or authentic interpretation* to the treaty. As the PCIJ pointed out in its *Jaworzina* opinion of 1923: ‘it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body which has the power to modify or suppress it.’”) (citation omitted) [R-88]; ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1968 VIENNA CONVENTION ON THE LAW OF TREATIES 25 n. 31 (2007) (“An authentic interpretation exists when all parties to a treaty reach an agreement, governed by international law, to henceforth understand the treaty in some specific way.”) [R-89]. Likewise, Professor Mustafa Kamil Yasseen, a principal drafter of the Vienna Convention on the Law of Treaties, observed that, “more than anyone, the parties to the treaty are best situated to understand the sense of the treaty that they concluded and what they truly intended.” Mustafa Kamil Yasseen, *L’interprétation des traités d’après la Convention de Vienne sur le droit des traités*, 151 COLLECTED COURSES OF THE HAGUE ACADEMY 1, 47 (1976) (“[P]lus que personne, les parties au traité sont à même de comprendre le sens du traité qu’elles ont conclu, ce qu’elles ont vraiment voulu.”) (translation by counsel) (emphasis added) [R-90].

<sup>163</sup> *Cases of Dual Nationality*, XIV UN REPS. INT’L ARB. AWARDS, at p. 34 [R-30].

<sup>164</sup> Tomuschat Opinion ¶ 22.

<sup>165</sup> As the International Court of Justice observed in the *Oil Platforms* case, if the treaty provision at issue “impose[d] actual obligations on the Contracting Parties, obliging them to maintain long-lasting peaceful and friendly relations,” then “the Parties would have been led to point out its importance during the negotiations or the process of ratification.” *Case Concerning Oil Platforms* (Iran v. U.S.), 1996 I.C.J. 803, ¶¶ 25, 29 (Decision on Preliminary Objections of Dec. 12) (rejecting Iran’s argument that Article 1 of the 1955 Treaty of Amity, Economic Relations and Consular Rights (“There shall be firm and enduring peace and sincere friendship between the United

will of one of the parties or the intended will of one of the parties, but the consensual will of *all* of the parties, which stems from the text they agreed to and upon which the agreement was built.”<sup>166</sup>

## **1. Article VII Does Not Create Advisory Jurisdiction**

Nothing in Article VII allows the Tribunal to act as an advisory body, as the ICJ is permitted to do under certain circumstances. The ICJ has jurisdiction not just to resolve “legal disputes” but also “to give an advisory opinion on any *legal question* at the request of whatever [UN] body may be authorized by or in accordance with the Charter of the United Nations to make such a request.”<sup>167</sup> The types of questions that have been put to the ICJ have often sought to clarify the meaning of a provision at issue in order to guide, through a non-binding opinion, the operation of the UN body making the request.<sup>168</sup> Significantly, the question that Ecuador has put to this Tribunal is not a contentious question at all; rather, it is virtually identical to the kind of question put to the ICJ when asked to render an advisory opinion. The State-to-State

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States and Iran”) “does not merely formulate a recommendation or desire . . . , but imposes actual obligations on the Contracting Parties, obliging them to maintain long-lasting peaceful and friendly relations”) [R-72].

<sup>166</sup> Luiz Olavo Baptista, *Interpretation and Application of WTO Rules: Florentino Feliciano and the First Seven*, in *LAW IN THE SERVICE OF HUMAN DIGNITY: ESSAYS IN HONOUR OF FLORENTINO FELICIANO* 127, 135 (Charnowitz et al. eds. 2005) (emphasis added) [R-91].

<sup>167</sup> Statute of the International Court of Justice, art. 65.1 (emphasis added) [R-25].

<sup>168</sup> See *Interpretation of Peace Treaties*, First Phase, 1950 I.C.J. 65, 71 (Advisory Opinion of Mar. 30) (describing Court’s advisory opinions to be “of an advisory character” lacking “binding force,” and offered in cases that “the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take”) [R-6]. At least one other treaty between the United Nations and its Member States includes resort to advisory opinions by the ICJ to resolve legal questions. See Convention on the Privileges and Immunities of the United Nations (Feb. 13, 1946), I U.N.T.S. 15, art. VIII, § 30 (“ . . . If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.”) [R-27].

arbitration clause in the Treaty, however, does not expressly allow for such an opinion, and this Tribunal would be acting outside the scope of its limited judicial function to render one.<sup>169</sup>

## **2. Article VII Does Not Create Appellate Jurisdiction**

Nothing in Article VII grants the Tribunal the discretion to serve an appellate function. States parties may provide appellate jurisdiction to an arbitral panel, as they have to the Appellate Body of the World Trade Organization. The Dispute Settlement Understanding (DSU) expressly grants the Appellate Body the limited jurisdiction to decide “issues of law covered in the [underlying] panel report and legal interpretations developed by the panel.”<sup>170</sup> Article VII, however, contains no such authorizing language.

When the United States has indicated its willingness to consider consenting to appellate jurisdiction in the BIT context, it has done so expressly. In its more recent BITs and investment chapters of free trade agreements, the United States has provided expressly that the Parties may consider the possibility of establishing an appellate mechanism to serve as a system of control to ensure predictability and consistency on the meaning of treaty provisions.<sup>171</sup> But the very fact that the United States has stated its *willingness to consider* submitting to appellate jurisdiction in the BIT context is further evidence that the State-to-State arbitration clause in existing U.S. BITs is not and never was intended to function as an appellate mechanism.

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<sup>169</sup> See Reisman Opinion ¶¶ 26-27 (describing advisory opinions).

<sup>170</sup> WTO Dispute Settlement Understanding, art. 17.6 [R-17].

<sup>171</sup> See, e.g., 2012 U.S. Model BIT, Article 28.10 (“In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 34 should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article 29”) [R-22]. The Dominican Republic-Central America Free Trade Agreement provides similarly, at Article 10.20.2.

Although Ecuador states that it does not intend to ask this Tribunal to seek review of the underlying award in the *Chevron* case,<sup>172</sup> its July 4, 2011 Press Statement implied that its goal in this arbitration is to undo that award. Ecuador stated:

[This arbitration is] consistent with the process for nullity of the Decision on Jurisdiction and the Partial Decision made by the Arbitration Tribunal on the Chevron Case II initiated by Ecuador on June 7, 2010 at the District Court at The Hague, that seeks to leave without effect the groundless decision of this Tribunal for being opposed to legal principles, both of the Ecuadorian system and that of international law, thus avoiding the generation of an ominous precedent for Ecuador in this regard.<sup>173</sup>

Ecuador's request for an interpretation was prompted by the *Chevron* award and as such is similar to a request for an appeal.<sup>174</sup> Seeking the nullification of the *Chevron* award would assume that the Tribunal has the power to overturn an investor-State arbitration award.

National courts have prevented parties from using parallel arbitration proceedings to appeal, via collateral attack, issues previously decided by another arbitral tribunal. The case *X S.A. v. Y Ltd.* is instructive.<sup>175</sup> There, an ICC arbitral tribunal rendered a partial award in favor of Company Y, reserving questions of damages for a subsequent phase of the arbitration. In the meantime, the losing party, company X, brought a second ICC arbitration under the same contract, seeking a "declaration" on the validity of the parties' underlying agreement. At the same time, company X sought to set aside the partial award in Swiss courts, and it asked the initial arbitral tribunal to stay its proceedings. The Swiss Federal Court rejected Company X's

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<sup>172</sup> See Transcript of Preparatory Meeting, Mar. 21, 2012, at p. 15 (statement of Ecuador's counsel).

<sup>173</sup> See Ecuador's Press Release dated July 4, 2011 [R-112]. See also PowerPoint Presentation of Ecuador's Attorney General [R-113].

<sup>174</sup> See Reisman Opinion ¶¶ 47-49 (comparing the similarity between the interpretation that Ecuador seeks to obtain from this tribunal and the relevant decisions by the investor-State tribunal in the related dispute between Ecuador and Chevron).

<sup>175</sup> *X S.A. v. Y Ltd.*, Case 4A\_210/2008/ech, Oct. 29, 2008 (Swiss Federal Court, 1st Civ. Law Division), 27 ASA BULL., No. 2, p. 309, 323 [R-12].

impermissible attempt to defeat the liability holding of the initial tribunal's partial award. The initial tribunal, moreover, declined to stay its proceedings and allow the second tribunal to pronounce on the legal validity of the underlying contract, thus further rejecting Company X's ploy.

The tribunal in *Lucchetti v. Peru* reached a similar conclusion.<sup>176</sup> After Lucchetti had brought an investment claim against Peru under the Chile-Peru BIT, Peru commenced arbitration against Chile under the BIT's State-to-State arbitration provision. Peru then asked the investor-State tribunal to suspend its proceedings, "in view of the fact that Claimants' Request for arbitration [was] . . . the subject of a concurrent State-to-State dispute between the Republic of Peru and the Republic of Chile."<sup>177</sup> The investor-State tribunal – comprising Bernardo Cremades, Jan Paulsson, and Thomas Buerghenthal (presiding) – declined to suspend its proceedings, undoubtedly conscious of the need to prevent State-to-State arbitration from being used preemptively for collateral attack.<sup>178</sup>

Professor Francisco Orrego Vicuña has condemned the use of State-to-State arbitration as a means of circumventing obligations owed to investors:

Resort to inter-State arbitration under ICSID, for example, in order to avoid the obligations the State has accepted in respect of an investor under the same Convention and bilateral investment treaties, constitutes an "*abus de droit*"

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<sup>176</sup> *Empresas Lucchetti S.A. and Lucchetti Peru S.A. v. Republic of Peru*, ICSID Case No. ARB/03/04, Award, Feb. 7, 2005 [R-50].

<sup>177</sup> *Id.* ¶ 7 [R-50].

<sup>178</sup> *Id.* ¶ 9 [R-50]. See also Reisman Opinion ¶¶ 33-34; *Československá Obchodní Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Procedural Order No. 4 (Jan. 11, 1999), at p. 2 (recommending suspension of bankruptcy proceedings in domestic court because they could lead to the determination of legal issues already under consideration in the pending ICSID proceedings) [R-73]; *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2, (Oct. 16, 2002) (recommending "that the Islamabad-based arbitration pending between the Government of Pakistan and SGS be stayed until such time, if any, as this Tribunal has issued an award declining jurisdiction over the present dispute, and that award is no longer capable of being interpreted, revised or annulled pursuant to the ICSID Convention.") [R-74].

sufficient for the inter-State tribunal to decline its jurisdiction or for the first seized tribunal to reject any application for the stay of proceedings.<sup>179</sup>

There are clear dangers to expanding the Treaty's dispute-settlement jurisdiction to include either appeal or collateral attack.<sup>180</sup> While drawing the Tribunal's attention to the close symmetry between Ecuador's request in this case and the holding in the *Chevron* award, Professor Reisman highlights Ecuador's attempt to use "the inter-state track in order to invent a procedure for appellate review [of the Chevron decision] or compelling renegotiation" of Article II(7), which "runs at cross purposes with the two-track jurisdictional regime of the BIT."<sup>181</sup> Professor Reisman thus rejects Ecuador's efforts as contrary to the BIT.<sup>182</sup> Indeed, finding jurisdiction to adjudicate the legal questions presented in this case would force the United States into a proceeding without its consent to relitigate a final award in a case in which it had no part.

### **3. Article VII Does Not Create Referral Jurisdiction**

Nothing in Article VII creates referral jurisdiction – the consideration of preliminary legal questions by a third party – for the Tribunal. When States establish referral jurisdiction, they do so expressly, by one of two procedures. First, States may establish "case-stated" procedures by which a national court or tribunal, *on its own initiative*, may refer a legal issue to an international court or tribunal for a binding decision. Under Article 9F of the Treaty of Lisbon, for instance, the European Court of Justice is expressly given jurisdiction to "give

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<sup>179</sup> Francisco Orrego Vicuña, *Lis Pendens Arbitralis*, PARALLEL STATE AND ARBITRAL PROCEDURES IN INTERNATIONAL ARBITRATION: DOSSIERS—ICC INSTITUTE OF WORLD BUSINESS LAW, p. pp. 207, 214 Bernardo Cremades ed., 2005 [R-92].

<sup>180</sup> See, e.g., *Case No. A/20*, Dec 45-A20-FT, July 10, 1986, ¶ 8, 11 IRAN-U.S. CL. TRIB. REP. 271, 274 (declining to exercise jurisdiction to "interpret" Algiers Accords when the request was a mere pretext to circumvent a final and binding decision). See also *id.*, Concurring Opinion of Judge Brower ("This clearly was nothing more than a request that the Full Tribunal overturn the Orders of Chamber One filed 26 December 1982 in *Flexi-Van Leasing Inc.* and *Islamic Republic of Iran*. . . . The Claims Settlement Declaration and the Tribunal Rules do not permit any such "appeal.") [R-75].

<sup>181</sup> Reisman Opinion ¶ 51.

<sup>182</sup> See *id.*



preliminary rulings at the request of courts or tribunals of the Member States, on the interpretation of [European] Union law or the validity of acts adopted by the institutions.”<sup>183</sup>

Second, States may establish “evocation” procedures, by which a *disputing party* may request removal of a legal issue from one court or tribunal to another for a decision. An example is found in the 1922 Treaty of Upper Silesia, which sought to protect the rights of residents following the partition of Germany and Poland.<sup>184</sup> The treaty allowed individuals in national court proceedings to request referral to an arbitral tribunal of questions concerning their rights under the treaty.<sup>185</sup> The tribunal then issued “authentic interpretations” of the treaty, which were binding on national courts.<sup>186</sup>

It is clear, therefore, that treaty parties know how to establish a mechanism by which a disputing party can seek referral of legal questions to an international tribunal for authoritative interpretations. This makes it equally clear that the Parties to the BIT did no such thing. Indeed, although commentators have considered the utility of this type of referral procedure in investment arbitration, they consider it an *alternative* to existing practice, thus confirming that BITs such as the one at issue here do not authorize such referrals.<sup>187</sup>

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<sup>183</sup> Treaty of Lisbon, art. 9F, in Official Journal of the European Union, vol. 50, Dec. 17, 2007 [R-28]. *See also* Treaty Establishing the European Atomic Energy Community, art. 150 (“Where such a question is raised before a court or tribunal of one of the Member States, such a court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. . . . Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.”) [R-29].

<sup>184</sup> Treaty Concerning Upper Silesia Concluded at Geneva on May 13, 1922, Between Germany and Poland (cited in *Factory at Chorzow (Germany v. Poland)*, 1928 P.C.I.J. (ser. A) No. 17 (Judgment of Sept. 13)) [R-76]. *See also* Georges S. Kaeckenbeeck, *Upper Silesia Under the League of Nations*, ANNALS OF THE AM. ACADEMY OF POL. & SOC. SCIENCE, Jan. 1946, p. 129 [R-93].

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *See generally* Gabrielle Kaufmann-Kohler, *Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are There Differences?*, ANNULMENT OF ICSID AWARDS 189 (E. Gaillard and Y. Banifatemi eds., 2004) [R-94].

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This Tribunal should reject Ecuador's invitation to graft onto Article VII advisory, appellate or referral functions that may exist under different treaty regimes but are not contained in the BIT. If the Parties wish to clarify the meaning of the Treaty, they must reach agreement between themselves, such as through consultations under Article V. This process is consistent with U.S. and other State practice under BITs.<sup>188</sup>

In short, the Tribunal has no authority under Article VII to decide abstract legal questions divorced from a concrete "dispute." This Tribunal, therefore, should reject Ecuador's request that it arrogate to itself extraordinary authority not granted to it by the Parties and engage in judicial lawmaking.

**D. A Finding of Jurisdiction Would Exceed the Tribunal's Judicial Function, and Any Award Would Constitute Judicial Lawmaking**

Because this Tribunal's mandate is limited to contentious, original jurisdiction, this Tribunal cannot grant Ecuador's request for an abstract interpretation of Article II(7) without exceeding its judicial function under Article VII. As Professor Baptista has warned:

An interpreter of law is someone who tries to explain what other people have drafted. He does not and should not create new rules. The interpreter does not have the right to say more or less than what is said in the text he is interpreting, and which is not his will but that of the author of the rules.<sup>189</sup>

Ecuador asks this Tribunal to be "the author of new rules" in order to find jurisdiction under Article VII – not simply to interpret existing law – and ultimately to issue "interpretations" of Article II(7) that go beyond its text and that would, under Ecuador's theory, bind future

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<sup>188</sup> See Reisman Opinion ¶¶ 42-46.

<sup>189</sup> Baptista, *Interpretation and Application of WTO Rules*, at p. 130 [R-91].

tribunals interpreting the scope of that provision. Yet nothing in the text of Article VII indicates that the Parties intended to grant the Tribunal such expansive powers, which would deprive them of the right to be the masters of the meaning of their treaties.<sup>190</sup>

The perils of performing the legislative function requested by Ecuador are clear. As Judge Gros admonished in *Nuclear Tests*: “There is a certain tendency to submit essentially political conflicts to adjudication in the attempt to open a little door to judicial legislation and, if this tendency were to persist, it would result in the institution, on the international plane, of government by judges[.]”<sup>191</sup> He added that “such a notion is so opposed to the realities of the present international community that it would undermine the very foundations of jurisdiction.”<sup>192</sup>

The *Aminoil* tribunal similarly warned against arbitral tribunals stepping into the shoes of the parties to regulate their affairs without their express consent:

[T]here can be no doubt that, speaking generally, a tribunal cannot substitute itself for the parties in order to make good a missing segment of their contractual relations – or to modify a contract – unless that right is conferred upon it by law, or by the express consent of the parties. The law does often give a tribunal this right . . . . [A]rbitral tribunals cannot allow themselves to forget that their powers are restricted. It is not open to doubt that an arbitral tribunal – constituted on the basis of a “compromissory” clause contained in relevant agreements between the parties to the case, and seized in the matter unilaterally by one of the parties only – could not, by way of modifying or completing a contract, prescribe how a provision . . . must be applied. For that, the consent of both parties would be necessary.<sup>193</sup>

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<sup>190</sup> As the Anglo-Italian Conciliation Commission stated: “if it had been intended to give the Conciliation Commission a jurisdiction which is not that which is generally attributed to Conciliation Commissions, and which does not come with their normal function, it should here [in the peace treaty] be stated expressly.” *Cases of Dual Nationality*, XIV UN REPS. INT’L ARB. AWARDS at p. 35 [R-30].

<sup>191</sup> Separate Opinion of Judge Gros, *Nuclear Test Case (Australia v. France)*, 1974 I.C.J. 253, 297 [R-77].

<sup>192</sup> *Id.*

<sup>193</sup> *In the Matter of an Arbitration Between Kuwait and the American Independent Oil Company (AMINOIL)*, Award, Mar. 24, 1982, 21 I.L.M. 976, 1015-16 [R-53].

Ecuador impermissibly asks the Tribunal to function as international legislator, not arbitrator – to substitute for the rule of sovereign consent to treaty interpretation its own judgment as to the meaning of Article II(7). The BIT does not grant this Tribunal, nor any other tribunal constituted under the Treaty, any such broad power of judicial legislation. To create a new rule of international law that would permit Ecuador’s request to go forward under Article VII would not only undermine the Tribunal’s legitimacy as a judicial body limited to resolving contentious cases, but also would improperly restrain the United States’ sovereign discretion to interpret treaties.

The Anglo-Italian Conciliation Commission’s decision in *Cases of Dual Nationality* brings the dangers of judicial legislation into high relief.<sup>194</sup> There, the United Kingdom invoked the underlying peace treaty’s dispute-settlement provision – “disputes concerning the application or interpretation” of certain provisions in the treaty<sup>195</sup> – to present the question of whether United Nations nationals could bring claims before the Commission if they had previously possessed Italian nationality. Though the issue had arisen in the context of prior claims before the Commission, the United Kingdom now presented the matter as an abstract legal question, outside the context of any particular case.

Italy opposed the United Kingdom’s request, arguing that “[t]he abstract interpretation of a provision [of the treaty] was beyond the [Commission’s] jurisdictional function.”<sup>196</sup> Such jurisdiction, Italy argued, “cannot be exercised except in respect of concrete cases and only as

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<sup>194</sup> *Cases of Dual Nationality*, XIV UN REPS. INT’L ARB. AWARDS [R-30].

<sup>195</sup> Article 83 of the 1947 Peace Treaty between the Allied Associated Powers and Italy authorized the Commission to resolve any disputes concerning “the application or interpretation” of Articles 75, 78, and Annexes XIV, XV, XVI, and XVII, part B, which establishes the applicable standards for reparation [R-16].

<sup>196</sup> *Cases of Dual Nationality*, XIV UN REPS. INT’L ARB. AWARDS, at p. 29 [R-30].

regards the determination of such cases.”<sup>197</sup> The Commission agreed with Italy that its competence did not extend to “disputes arising from the general interpretation” of the peace treaty.<sup>198</sup>

Its reasoning is instructive for this case. In reaching its decision, the Commission denied it had any authority as international legislators to supplant the role of the Parties. The Commission recognized that “an authentic interpretation” of the peace treaty “would demand, as definition, the agreement of all the contracting parties.”<sup>199</sup> There was no such agreement between the United Kingdom and Italy, and the views of the other signatories to the treaty were not known. Accordingly, the Commission balked at rendering the requested interpretation:

An interpretation according to which the Commission would also have the faculty to interpret the provisions of the Peace Treaty in an abstract and general manner, with obligatory effect for all future cases, would run the risk, because it is abusive, of ending in a judgement blemished by excess of power (it would create rules of law, which is not a jurisdictional function, but a legislative function), a very serious position in our case[.]<sup>200</sup>

The Commission therefore found, under a State-to-State dispute settlement provision nearly identical to Article VII, that interpreting the peace treaty in the abstract would fall outside its judicial functions: “the arbitrator cannot substitute the legislator.”<sup>201</sup>

Here, Ecuador effectively makes the same request of this Tribunal that the United Kingdom made of the Anglo-Italian Conciliation Commission. It asks the Tribunal to interpret Article II(7) in an abstract and general manner, outside the context of a concrete case, in a way

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<sup>197</sup> *Id.* [R-30].

<sup>198</sup> *Id.* at 34 [R-30].

<sup>199</sup> *Id.* [R-30].

<sup>200</sup> *Id.* [R-30].

<sup>201</sup> *Id.* at 35 (citing authorities) [R-30].

that deprives the Parties of the right to construe the Treaty they have made. Ecuador's exorbitant claim therefore must be dismissed.

**E. Exercising Jurisdiction Would Be Contrary to the Treaty's Object and Purpose and Would Have Far-Reaching and Destabilizing Consequences for International Adjudication**

This arbitration is both novel and exceptionally important for international law and adjudication. As addressed below, granting Ecuador's request would jeopardize the system of investment treaties, particularly investor-State dispute settlement provisions. A ruling for Ecuador also runs the risk of "judicializing" diplomacy, thereby chilling the free exchange of views that is so essential to foreign relations. And because the compromissory clause contained in the Treaty is found in countless other treaties, including hundreds, if not thousands, of investment treaties, granting Ecuador's request could throw open the door of State-to-State arbitration for matters that parties never contemplated litigating.

**1. Interpreting Article VII to Encompass Decisions on Legal Questions Decided by Investment Tribunals Under Article VI Would Conflict with the Object and Purpose of the BIT to Establish a Stable, Predictable, and Neutral Investor-State Dispute-Settlement Process**

Granting Ecuador's request in this case would jeopardize the system of investor-State dispute settlement by undermining stability, predictability, and neutrality – key principles built into Article VI. Under that provision, investors of one Party may initiate arbitration against the other Party with respect to covered investments and obtain a final and binding award.<sup>202</sup> Each Party "undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement," subject to any permissible annulment or set-aside

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<sup>202</sup> See Article VI (defining an "investment dispute" as a "dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment").

proceedings.<sup>203</sup> The BIT, however, does not provide for any further review or appeal of final awards,<sup>204</sup> including to counter the *Chevron* award. Ecuador's request for an "authoritative interpretation," if accepted, would undermine the system of investor-State arbitration under the Treaty in at least three ways.

*First*, an "authoritative interpretation" rendered by a State-to-State tribunal could be used to collaterally attack an award rendered by an investor-State tribunal, such as the *Chevron* award. Although Ecuador first threatened arbitration only weeks before commencing an action in Dutch courts to set aside the *Chevron* award, Ecuador now claims that "[t]his arbitration is not intended to have any effect on the *Chevron* Award."<sup>205</sup> Despite representations that it will not seek to use an award in this arbitration in Dutch courts, Ecuador could seek to use such an award to try to deny enforcement of the *Chevron* award in the courts of Ecuador or other countries. Other States, moreover, likely would follow Ecuador's lead and seek to obtain, through State-to-State arbitration, "authoritative interpretations" of BIT provisions for use in annulment, set-aside, or enforcement proceedings.

*Second*, Ecuador's request, if granted, would undermine a principal rationale for investor-State arbitration, which is to *depoliticize* investment disputes and permit neutral and binding arbitration between the State and the investor.<sup>206</sup> As Professor Vinuesa has observed:

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<sup>203</sup> Article VI(6).

<sup>204</sup> See Reisman Opinion ¶¶ 30-31. As noted above, however, a Party could bring a State-to-State arbitration if the other Party refused to comply with its obligation to "carry out without delay the provisions" of an investor-State award or failed to enforce that award under Article VII.

<sup>205</sup> Transcript of Preparatory Meeting, Mar. 21, 2012, at p. 15 (statement of Ecuador's counsel). Ecuador has not, however, made the same commitment regarding the enforcement of award once those set-aside proceedings conclude.

<sup>206</sup> See, e.g., VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS at p. 30 ("The investor-state disputes mechanism thus served two political goals: it removed the United States government from involvement in private investment disputes that might disrupt foreign policy while reaffirming U.S. support for the protection of foreign

To preserve the [investment arbitration] system is to persist in credibility and legal certainty as values to be protected in order to attract foreign investment. In that sense the nonpolitical interference of dispute settlements mechanisms, should be a must.<sup>207</sup>

In any actual or impending investor-State arbitration, the respondent State could demand that the investor's State agree to the respondent State's interpretation of the Treaty. If the investor's State declined to express its view, it would face arbitration, such as this one. As Professor Reisman has opined, Ecuador's submission, if accepted, "would have the effect of drawing the United States government into each investment dispute in which the American investor had gained or lost an award."<sup>208</sup>

Ecuador's request, Professor Reisman notes, "would create a model for other states-parties to BITs with the United States and other states *inter se* with respect to their own BITs to request 'interpretation' in cases which they or their investors have *lost* a case against the host state or against their national investor."<sup>209</sup> By the same token, it would "put the United States government and other governments under pressure from national claimants who had lost their BIT arbitrations to initiate inter-State arbitrations in order to reverse the effect of the adverse awards and their holdings."<sup>210</sup> In short, Ecuador's "innovation would be to erode the effectiveness of BITs' investor-State arbitration" and "consume, once again, precisely those administrative and international and domestic political resources which the privatization of

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investment.") [R-11]. See also Statement of Mr. Daniel Tarullo, Testimony Before the U.S. Senate Foreign Relations Committee, *Bilateral Investment Treaties with Argentina, Armenia, Bulgaria, Ecuador, Kazakhstan, Moldova, and Romania* (Sept. 10, 1993) (noting benefits of allowing investors to submit investment disputes directly to international arbitral tribunals) [R-114].

<sup>207</sup> Raúl Emilio Vinuesa, *Bilateral Investment Treaties and the Settlement of Investment Disputes Under ICSID: The Latin American Experience*, 8 L. & BUS. REV. AM. 501, 534 (2002) [R-95].

<sup>208</sup> Reisman Opinion ¶ 54.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*



international investment arbitration has permitted the governments who have elected to use BITs to husband.”<sup>211</sup>

*Third*, Ecuador’s request, if granted, threatens to create a new, and unprecedented, referral mechanism for investment arbitration, of the kind, as explained above, that Article VII does not allow. A respondent could seek to obtain an interpretation of a treaty provision for use in an ongoing investor-State arbitration by pursuing parallel (and fast-track) State-to-State arbitration.<sup>212</sup> This procedure would essentially create a preliminary referral mechanism such as the one established for the European Court of Justice, despite the total absence of evidence indicating that the Treaty Parties intended to create such a mechanism.<sup>213</sup>

## **2. Finding Jurisdiction Would Chill Bilateral Dialogue Between the Parties and Effectively Nullify the Treaty’s Consultations Provision**

Accepting Ecuador’s position on Article VII would mean that one Party could take the other to arbitration any time the Parties disagreed about, or one Party failed to respond to, any assertion concerning the meaning or operation of the Treaty. Ecuador’s broad interpretation of Article VII would effectively judicialize significant aspects of their bilateral relationship that the Parties never intended to be adjudicated. The effect could cut down many potentially useful lines of communication and agreement between the Parties.

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.* ¶ 55 (“If Ecuador’s application is allowed in this case, there is nothing to prevent it – and similarly situated states – from raising such an application at any time during the investor-state arbitration, in effect paralyzing those arbitrations.”).

<sup>213</sup> See Pierre-Marie Dupuy, *Competition Among International Tribunals and the Authority of the International Court of Justice*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA, 862, 874-875 (U. Fastenrath *et al.* eds. 2011) (“As for the ICJ, its members would be delusional in believing that they will succeed in imposing the idea of a preliminary question procedure, by which other tribunals would require enlightenment on the interpretation of rules of international law.”) [R-96].

The U.S.-Ecuador bilateral economic relationship comprises a multitude of interactions between U.S. and Ecuadorian government officials of all levels in numerous settings of varying degrees of formality. These interactions occur, for example, in Washington, between various U.S. government agencies and the Ecuadorian embassy; in Quito, between the U.S. embassy and Ecuadorian ministries; and throughout the world, at regional and multilateral conferences. Representatives of both governments also participate in meetings of the U.S.-Ecuador Trade and Investment Council (“TIC”) and in the U.S.-Ecuador Bilateral Dialogue to discuss a broad range of trade- and investment-related matters. In TIC meetings held in 2009, for example, a number of trade and investment matters were discussed, including important issues concerning the U.S.-Ecuador BIT.<sup>214</sup> All of these opportunities for interaction can promote a positive exchange of views between governments.

A ruling that this Tribunal could adjudicate Ecuador’s diplomatic *demarche* would drastically change this dynamic. Officials of both Parties would forever approach with extreme caution every request for discussion about the Treaty, whether at the TIC or in any other forum. Indeed, any expression of disagreement, silence, or even the mere failure to respond immediately to the other Party’s assertion about the Treaty could land the Parties in State-to-State arbitration. Under these highly litigious conditions, free and open discussion regarding matters relating to the Treaty would be chilled.

This problem would be particularly acute in the context of any consultations pursuant to Article V of the Treaty. Under that provision, the Parties agree “to consult promptly, on the request of either, . . . to discuss any matter relating to the interpretation or application of the

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<sup>214</sup> See 2009 Press Release by the Office of the United States Trade Representative, *The United States and Ecuador hold Trade and Investment Council Meeting*, available at <http://www.ustr.gov/about-us/press-office/press-releases/2009/november/-united-states-and-ecuador-hold-trade-and-investm> [R-115].

Treaty.” As explained above, use of the term “matter” indicates a much broader scope for consultations under Article V than arbitration under Article VII, which covers only “disputes.” A “matter,” unlike a “dispute,” is not limited to situations in which the Parties are in positive opposition regarding a concrete case concerning compliance with obligations under the Treaty.<sup>215</sup> Thus, Article V is meant to foster discussion, not arbitration, of a wide range of issues concerning the interpretation or application of the Treaty, including abstract questions regarding the meaning of Article II(7).

But if Ecuador’s broad interpretation of “dispute” were adopted, consultations under Article V would always proceed under the threat of arbitration. Committed to consult in good faith, a Party may naturally wish to address the substance of a question of treaty interpretation posed by the other Party. But in Ecuador’s view, any disagreement or failure to respond in consultations would give rise to a “dispute” within the meaning of Article VII. Thus, any “matter” for consultation, no matter how abstract or general, could be transformed unilaterally into a “dispute” for purposes of arbitration.<sup>216</sup> The structure of Article V, which permits consultations on disputes as well as matters, is contrary to this view; there are two separate categories. Were Ecuador’s reading adopted, the object and purpose of Article V consultations would be thwarted. The Parties could no longer discuss matters freely and openly without the fear that what might or might not be said in consultations would lead eventually to arbitration.

Even more disconcerting, Ecuador’s position would allow a Party to bypass altogether Article V consultations or other channels for discussion and jump immediately and improperly to

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<sup>215</sup> See VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS at p. 735 (observing that “[t]he obligation to consult does not depend upon an allegation that the treaty has been violated”) [R-80].

<sup>216</sup> According to *Oppenheim’s*, this result would be inappropriate because “[w]hile consultations must be undertaken in good faith, they do not give to any of the states involved a right to have its views accepted by the others or to stop them acting in whatever way they propose.” OPPENHEIM’S INTERNATIONAL LAW § 573 [R-83].

the procedures of Article VII, as Ecuador has plainly done here. Ecuador has asserted in its initial communication with the United States that, “if such a confirming note” from the United States agreeing to Ecuador’s interpretation of Article II(7) “is not forthcoming or otherwise the . . . United States does not agree . . . , an *unresolved dispute* must be considered to exist[.]”<sup>217</sup> Thus, according to Ecuador, one Party can decide unilaterally that a response to its request for interpretation was not “forthcoming” with sufficient dispatch and proceed directly to arbitration under Article VII.

Yet the plain text of Articles V and VII demonstrate a far more disciplined approach for dealing with such matters, one which draws a sharp distinction between bona fide “disputes,” which can be arbitrated, and “matters,” which cannot. Accepting Ecuador’s position on Article VII would therefore undermine the operation of the Treaty, which promotes through Article V (but does not compel by threat of arbitration) diplomatic discussions regarding a wide range of matters between the Parties relating to the Treaty. By conflating the different functions of Articles V and VII under the Treaty, Ecuador’s approach has the effect of judicializing large swaths of the Parties’ economic and political relationship that are not appropriate for dispute resolution. Plainly, this was never the Parties’ intention. Were the Tribunal to find jurisdiction, the economic dialogue between the Parties would quickly devolve into a series of arbitrations. The entire diplomatic relationship would become increasingly litigious, to the point that potentially fruitful avenues of discussion – such as Article V consultations, the TIC, and the Bilateral Dialogue – could be substantially restricted.

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<sup>217</sup> *Id.* (emphasis added) [R-2].

### **3. Finding Jurisdiction Would Establish a Dangerous Precedent for the Interpretation of Other Treaties**

For all of these reasons, this arbitration represents an exceptional case of first impression that could set a dangerous precedent for international law. Hundreds, if not thousands, of BITs contain State-to-State dispute settlement provisions that are identical or very similar to Article VII of the Treaty. Finding jurisdiction in this case thus could open the floodgates of State-to-State arbitration, not only under U.S. investment treaties but myriad other investment treaties. The cascading impact of the Tribunal's decision in this case could be huge.

All of the negative policy consequences that would flow from finding jurisdiction in this case would be equally relevant under other investment treaties. Treaty partners would lose their ability to define the meaning of the treaties they concluded. Discussions among Treaty partners about the meaning of treaties would proceed under the constant threat of State-to-State arbitration and would be accordingly chilled. The finality of investor-State awards rendered pursuant to investment treaties would be placed in serious doubt. The problems resulting from adopting Ecuador's interpretation of Article VII thus could be compounded exponentially.

Further, the same or similar State-to-State arbitration clause appears in many other bilateral and multilateral treaties unrelated to investment protection. For example, the operative language of Article VII is a staple of many UN agreements, including the UN Law of the Sea Convention. It is also found in abundance in aviation and environmental agreements. To date, no court or tribunal has adopted the overly broad interpretation of "disputes concerning the interpretation or application of the Treaty" proposed by Ecuador. Were this Tribunal to do so, the consequences could be far-reaching and destabilizing, creating a roadmap for claims in State-to-State arbitration that could unravel the longstanding system of international treaties. In short,

Ecuador invites this Tribunal not just to exceed its authority in this case, but more fundamentally to displace the role of bilateral diplomatic discussion and to destabilize the entire system of interstate arbitration. This Tribunal should not impose this result upon the arbitral system or upon the United States.

### **III. RELIEF SOUGHT**

For the foregoing reasons, and those set out in the Statement of Defense, the United States respectfully requests that this Tribunal render an award: (1) dismissing Ecuador's request in its entirety and with prejudice; (2) ordering such further and additional relief as the United States may request and the Tribunal may deem appropriate; and (3) ordering that Ecuador bear the costs of this arbitration, including the United States' costs for legal representation and assistance, pursuant to Article VII(4) of the Treaty and Article 40 of the UNCITRAL Arbitration Rules.

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Dated: April 25, 2012

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'HHK', is positioned above the typed name of the signatory.

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